ADVISORY COMMITTEE ON CIVIL RULES

Hearing on Proposed Amendments to Rules 7.1, 26, 41, 45, and 81

January 27, 2026

ADVISORY COMMITTEE ON CIVIL RULES

Hearing Schedule
January 27, 2026
10:00 a.m. – 2:30 p.m. (Eastern)

Please note that all times are Eastern. Timing is approximate and subject to change. Each witness will have 10 minutes. Please keep your remarks brief so there will be ample time for questions from committee members within the 10 minutes. Each witness should be prepared to start after the previous witness concludes and the Chair calls the next witness.

	Time Slot	Name	Organization	Rule(s)
Chair's Welcome and Opening Remarks at 10:00				
1	10:05–10:15	Scott Hendler	Hendler Flores Law	Rule 41
2	10:15–10:25	Tobi Millrood	Kline & Specter	Rules 41 & 45
3	10:25–10:35	Thomas Allman	Retired General Counsel, BASF Corporation	Rules 7.1 & 45
4	10:35–10:45	Jonathan Redgrave	Redgrave LLP	Rules 7.1 & 45
5	10:45–10:55	Melissa Kotulski	International Attestations, LLC	Rules 7.1, 26, 41 & 45
Break from 10:55–11:10 (estimated)				
6	11:10–11:20	Lauren Barnes	Public Justice	Rule 45
7	11:20–11:30	Mary D'Agostino	Hancock Estabrook	Rule 45
8	11:30–11:40	Xiomara Damour	Mayer Brown	Rule 45
9	11:40–11:50	Alex Dahl	Lawyers for Civil Justice	Rule 45
10	11:50–12:00	Navan Ward **(Testimony at Tab 19)**	Beasley Allen (American Association for Justice)	Rule 45

ADVISORY COMMITTEE ON CIVIL RULES

Hearing Schedule
January 27, 2026
10:00 a.m. – 2:30 p.m. (Eastern)

	Time Slot	Name	Organization	Rule(s)
11	12:00–12:10	Steven Fleischman	Horvitz & Levy	Rule 45
12	12:10–12:20	Brian Fitzpatrick	Vanderbilt Law School	Rule 45
~~13~~	~~12:20–12:30~~	~~Max Heerman~~	~~Medtronic~~	~~Rule 45~~
Break from 12:20–1:30 (estimated)				
14	1:30–1:40	Robert Levy	Exxon Mobil	Rules 7.1, 26 & 45
15	1:40–1:50	Matthew Moeller	The Moeller Firm	Rule 45
16	1:50–2:00	Mary Novacheck	Nelson Mullins	Rule 45
17	2:00–2:10	John Southerland	Huie, Fernambucq, & Stewart	Rule 45
18	2:10–2:20	Tiega Varlack	Varlack Legal Services	Rule 45
19	2:20–2:30	Rachel Downey **(Testimony at Tab 10)**	Hagens Berman	Rule 45
Final Questions & Closing Remarks at 2:30 (estimated)				

TAB 1

No written testimony outline or comment
was submitted by the requested January 16, 2026
deadline.

TAB 2

AMERICAN ASSOCIATION FOR JUSTICE®
The Association for Trial Lawyers

Statement of Tobi L. Millrood

Past President, American Association for Justice
Partner, Kline Specter

Before the Advisory Committee on Civil Rules
January 27, 2026

Thank you for providing an opportunity to comment on proposed amendments to Rule 45(c)—subpoena for remote testimony and 41(a)—voluntary dismissal of actions or claims. Both rules, along with Rule 45(b) on service of subpoenas, are extremely important to the American Association for Justice (AAJ) and its members. My name is Tobi Millrood, I'm a past president of AAJ, and Chair of the Mass Tort practice of Kline & Specter in Philadelphia, Pennsylvania. I am AAJ's "pandemic" president, having presided over a fully remote operation during my 2020-2021 term as President of the largest plaintiff-side voluntary bar association. The AAJ will file public comments in support of 41(a), 45(b), and 45(c), and Navan Ward, my successor and AAJ past president (2021-2022), will address the subpoena rule amendments at today's hearing. AAJ supports the proposed amendments to Rule 45(c) and 41(a) and proposes modest amendments that we believe will improve their functioning. AAJ thanks the Advisory Committee on Civil Rules (Advisory Committee) for its continued and careful consideration of the plaintiff perspective.

I. AAJ Supports Proposed Amendments to Rule 45(c)

The proposed amendments to Rule 45(c) correct the Ninth Circuit's misinterpretation of *In re Kirkland* and restore the nationwide subpoena authority that has existed since the 2013 amendments, which authorized nationwide service of subpoenas while preserving Rule 45(c)(1)'s longstanding 100-mile protection against compelled travel. *Kirkland* erroneously conflated "place of attendance" with physical presence in the courtroom and misconstrued the interaction between *service* and *attendance* requirements. The proposed amendments clarify that courts may compel remote trial testimony from any witness nationwide so long as the witness is not required to travel beyond the 100-mile limitation.

Modern litigation regularly involves witnesses spread across the country, particularly in class actions or MDLs. The very precondition of 28 USC §1407 transfer for coordinated MDL proceedings is that it will "be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." Particularly post-pandemic, when remote proceedings have often become the rule, rather than the exception, the Civil Rules should foster convenience and efficiency. Physical attendance may impose severe burdens on witnesses who live far from federal courthouses, particularly in large states, rural regions, or districts with sparse courthouse coverage. Even the most well-planned, in-person testimony may be thwarted by travel disruptions, weather emergencies, caregiving responsibilities, medical issues, or shifting trial

schedules. In response, courts have recognized that compelling physical attendance under such conditions can constitute undue burden or expense under Rule 45(d).[1]

Litigants rarely face a choice between in-person testimony and live remote testimony. Rather, the true choice is between live testimony and a prerecorded deposition—often taken months or years before trial and without the benefit of contemporaneous cross-examination or impeachment. Stale testimony not only presents substantive considerations for judge and jury, but logistical ones as well. It is quite common for parties to request or require "updated" testimony to account for the interim time since the original deposition, in these lengthy complex litigations. While in-person testimony remains the gold standard, live remote testimony is the closest functional equivalent and far superior to written or prerecorded substitutes. It can enhance accuracy by enabling real-time questioning in ways that deposition video cannot and is more likely to result in jurors paying close attention to the testimony provided. What's more, in their role as factfinder, juries should be entitled to contemporaneous testimony where they can perceive the demeanor and expression of witnesses under the confrontation of direct and cross examination.

Rigid geographic limits on the subpoena power, therefore, risk excluding essential testimony solely because a witness falls on the wrong side of an arbitrary mile marker. The proposed amendments appropriately respond to this problem by ensuring that geography does not dictate whether a jury may hear material testimony. The judiciary's experience during and after the pandemic demonstrates that remote testimony is a practical, reliable solution to disruptions of all kinds and ensures that trials proceed efficiently rather than grinding to a halt.

II. Modest Textual Changes Would Avoid Ambiguity and Protect Existing Remote Practices

To ensure that courts and litigants apply the rule consistently—and to avoid unintended consequences for the robust remote-testimony practices courts have already adopted—AAJ recommends modest clarifications to the rule text and Committee Note. These refinements would preserve the Committee's intent, promote uniform application across circuits, and prevent misreadings rooted in syntax or terminology.

First, to avoid ambiguity arising from inconsistent usage of the terms "place" and "location," AAJ recommends the following change to proposed Rule 45(c)(1):

> For Remote Testimony. Under Rule 45(c)(1), the place of attendance for remote testimony is the location from where the person is commanded to provide the remote testimony ~~to appear in person~~.

[1] *E.g.*, *FTC v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000) ("I am mystified as to why anyone would think that forcing a person to travel across the continent is reasonable when his testimony can be secured by means which are a) equivalent to his presence in court and b) preferable to reading his deposition into evidence."); *Beltran-Tirado v. INS*, 213 F.3d 1179, 1186 (9th Cir. 2000) (suggesting that geographical limitation is sufficient cause for contemporaneous video testimony).edit

This revision makes explicit what the proposed amendment already implies: when a witness provides testimony remotely, the "place of attendance" under Rule 45(c)(1) is the witness's physical location. The distinction between "place of testimony" and "place of attendance" became a source of confusion in *Kirkland*, where the Ninth Circuit implicitly treated "attendance" as synonymous with being physically present in the same courtroom as the judge. That reading conflicted with both the 2013 amendments and longstanding Rule 43 jurisprudence, which recognized that testimony may occur in open court even when delivered by contemporaneous transmission from a remote location. Clarifying that "place of attendance" refers to the witness's location also ensures the rule cannot be misconstrued in future cases, maintains internal consistency within the rule and Committee Note, and reduces the risk of interpretive divergence among district courts.

Second, to avoid confusion about whether remote testimony occurs at the witness's physical location or in the courtroom, AAJ recommends the following revision to the third paragraph of the draft Committee Note:

> For purposes of Rule 43 and Rule 77(b), such remote testimony should be considered as occurring in the court where the trial or hearing is conducted.

As drafted, the Note could be mistakenly read to suggest that remote testimony "occurs" at the witness's location, potentially affecting venue, jurisdictional questions, courtroom management, and even the public's right of access. Courts have long held that remote testimony is deemed to occur in the courtroom for purposes of Rule 43(a)'s "open court" requirement, even when the witness appears from a distant location. These clarifications would ensure the correct application of the rule going forward.

III. AAJ Supports Proposed Amendments to Rule 41(a)

The rise of complex litigation has dramatically changed the litigation landscape, with cases involving multiple claims and parties arising much more frequently today than 20 years ago. One practice area that has changed significantly is the rise of police misconduct litigation,[2] which frequently involves claims against multiple defendants.[3] A typical police or prisoner misconduct case may involve initial harms inflicted by officers or correctional guards that are followed or compounded by additional harms, such as emergency responders' or health professionals' failure to provide prompt and effective medical care. The proposed amendments would allow for streamlining of claims, ensuring that cases can move forward expeditiously, while providing a mechanism for dismissing claims that are no longer viable after more information becomes available or have been settled.

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[2] AAJ formed a Police Misconduct Litigation Group in 2013 to help trial lawyers learn to represent client injured by police who were supposed to protect them.

[3] The rise of this litigation generally involves multiple claims over time against the same officers, whose claims are paid by the police department that employs them. *See, e.g.*, Keith L. Alexander, Steven Rich, & Hannah Thacker, *The Hidden Billion Dollar Cost of Repeated Police Misconduct*, WASH. POST, Mar. 9 2022; Aurélie Ouss & John Rappaport, *Is Police Behavior Getting Worse? Data Selection and the Measurement of Policing Harms*, 49 J. LEGAL STUD. 153, 153 (Jan. 1, 2020) (finding that "societal responses to policing harms are intensifying").

While I am not a civil rights practitioner, I do handle complex matters, and streamlining claims is essential, especially given the long wait for jury trials in federal court. The Advisory Committee is to be commended for drafting the proposed text to ensure that the rule provides the flexibility needed by practitioners to dismiss an entire action or one or more claims. The proposed amendment provides needed efficiency for managing claims that inures to the benefit of both courts and parties.

Finally, AAJ supports both options for a plaintiff to dismiss provided in the proposed amendment to 41(a)(1)(A)(i)—either before the opposing party serves either an answer or a motion for summary judgment. However, AAJ opposes the suggestion to expand dismissal options to include a motion filed under Rule 12(b), (e), or (f). It seems reasonable to provide time for the defendant to answer the allegation raised in the complaint before the plaintiff considers whether to proceed as initially planned or to take some other action, which could include voluntary dismissal under Rule 41(a) or filing an amended complaint under Rule 15. For this reason, AAJ supports the 41(a)(1)(A)(i) as drafted with the very minor amendment suggestion below.

IV. A Minor Amendment to Rule 41(a) Suggested

AAJ recommends one minor edit to the rule text and the accompanying committee note to ensure clarity: In Rule 41(a)(1)(A)(ii) strike "all" and replace it with "the" instead.[4] The word "all" seems inconsistent with the added text referring to parties that "remain in the action." This is also conceptionally consistent with the purpose of the amendment: *that it be signed only by parties who have appeared and remain in the action*. With the edit, the rule text is:

> (ii) a stipulation of dismissal signed by ~~all~~ the parties who have appeared and remain in the action.

The first sentence of the second paragraph of the Committee Note would then be modified in the same manner.

V. Conclusion

AAJ strongly supports the proposed amendments to Rules 45(c) and 41(a). The amendments to Rule 45(c) restore clarity to nationwide subpoena authority, correct *In re Kirkland*, and ensure that federal courts remain accessible to witnesses, litigants, and jurors in a national system of justice. By facilitating live testimony regardless of geography, the amendments promote fairness, accuracy, and the ability of parties and witnesses to meaningfully participate in the judicial process. The amendments to Rule 41(a) promote efficiency, allowing plaintiffs to streamline cases for settlement or after more information becomes available. AAJ's suggestions are meant to strengthen the rules and ensure that they can be clearly implemented by the courts.

Thank you, and I would be happy to answer any questions.

[4] The Advisory Committee could also consider striking "all" and not adding any additional text.

TAB 3

January 12, 2026

To Civil Rules Advisory Committee

Re: Summary of Testimony, January 27, 2026

Participant: Thomas Y. Allman

Proposed rule 7.1

I support the modest changes to better assist judges in compliance with their statutory and ethical duties by conforming to the February 2024 Advisory Opinion 57 ("Disqualification Based on a Parent-Subsidiary Relationship") and to the 10% disclosure requirement of Fed. R. App. P. 1. I note the Subcommittee rejected a required disclosure of "any entity that has control over it" (Report, Agenda Book April 1, 2025, at 139 of 397). To the extent this includes TPLF-information, disclosure of agreements granting control should be covered in a rule analogous to Rule 26(a)(1)(A)(iv)(dealing with insurance agreements).

Proposed Rule 45 (b)((1) Service of Subpoena

I have no reason to disagree with the proposed changes to clarify the method of serving a subpoena under Rule 45 and removing the requirement that the witness fee be tendered at the time of service as a prerequisite to effective service. See, e.g., Ellis, "Delivering" A Subpoena: What Constitutes 'Good Service" Pursuant to FRCP 45," 103 Tex. L. Rev. Online 132, 147 (2025)(noting that the "vast majority of cases addressing service" arise in the context of "subpoenas issued to non-parties.")

Proposed Rule 45 (c) Place of Compliance for Remote Testimony/Pretrial Identification Under Rule 26(a)(3)(A)(i).

I agree with the proposal to clarify the place of attendance for remote testimony and also support pretrial disclosure of possible remote testimony in Rule 26. However, it may be necessary to amend Rule 43 to require prior authority to issue the subpoena to protect non-parties from undue burden or expense.

Proposal to Amend Rule 45(d)(2)(B)

Given the inappropriate adoption of a financial means test for non-party protection from incurring "significant" expenses from court ordered compliance over objection in what is now Rule 45(d)(2)(B), I recommend that the Rules Committee consider amending the Rule to clarify that the ability of a disinterested non-party to bear the costs of compliance is not relevant to determining if the reasonable expenses are significant, as I have advocated in 2026 Public Comment (Jan. 5) Rule 45 ("Amendment Needed to Rule 45(d)(2)(B)(ii), USC-RULES-CV-2025-0004-0040.

TAB 4

No written testimony outline or comment was submitted by the requested January 16, 2026 deadline.

TAB 5

From: Melissa Kotulski
Sent: Tuesday, January 13, 2026 3:24 PM
To: RulesCommittee Secretary
Subject: Re: Testimony

Hi all:

Below please find my outlines for presentations for Civil (January 27) and Evidence (January 29).

Best wishes,

Melissa

INTERNATIONAL ENCOURAGEMENTS (CIVIL)

(January 27, 2026)

International Encouragements for Proposed Changes to the Federal Rules of Civil Procedure

BIOGRAPHICAL STATEMENT

RULES TO CONSIDER IN THE INTERNATIONAL CONTEXT

- Nongovernmental Business Organization (Rule 7.1)
- Narrowing Voluntary Dismissal to Claims Rather than Entire Action (Rule 41)
- Remote Testimony/Technological

1. Express Statement on Remote or In Person Testimony (Rule 26)
2. Place for Remote Testimony (Rule 45)

ENCOURAGEMENTS (EVIDENCE)

(January 29, 2026)

International Encouragements for Proposed Changes to the Federal Rules of Evidence
Machine-Generated Evidence Admissibility (Rule 707) Outline: No Rule At All?

a. Biographical Statement (Self, International Attestations, cyber/tech law expertise)
b. Litigation, confusion, controversy
c. No Rule at All? Comment

The Honorable Melissa A. Kotulski
President, Founder, & Owner
(860) 394-0645
https://internationalattestations.com
International Attestations, LLC®

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TAB 6

No written testimony outline or comment was submitted by the requested January 16, 2026 deadline.

TAB 7

No written testimony outline or comment was submitted by the requested January 16, 2026 deadline.

TAB 8

No written testimony outline or comment was submitted by the requested January 16, 2026 deadline.

TAB 9

Back to Document Comments (/document/USC-RULES-CV-2025-0004-0001/comment)

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PUBLIC SUBMISSION

Comment from Lawyers for Civil Justice

Posted by the **United States Courts** on Oct 13, 2025

Docket (/docket/USC-RULES-CV-2025-0004)
/ Document (USC-RULES-CV-2025-0004-0001) (/document/USC-RULES-CV-2025-0004-0001) / Comment

Comment

See attached file(s)

Attachments 1

LCJ Public Comment on Rule 45 Service of Subpoenas Oct 10 2025

Download (https://downloads.regulations.gov/USC-RULES-CV-2025-0004-0006/attachment_1.pdf)

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Comment ID
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Tracking Number
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COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

FIXING WHAT'S BROKEN IN RULE 45: MOVING BEYOND MINOR SERVICE OF SUBPOENA ISSUES TO FIXING THREE CRITICAL "RULE PROBLEMS"

October 10, 2025

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Advisory Committee") in response to the Judicial Conference Committee on Rules of Practice and Procedure's Request for Comments on proposed amendments to Federal Rule of Civil Procedure ("FRCP") Rule 45.[2]

INTRODUCTION

The proposed amendment to Rule 45 ("Preliminary Draft")[3] is intended to "address practical problems" with service of subpoenas relating to the Rule's phrase "delivering a copy to the named person."[4] Yet the Advisory Committee's research reveals a weak case for the amendment: it found only two cases arguably involving ineffective service and concluded that service of subpoenas is rarely problematic. The marginal justification for amending the rule compares unfavorably with the high risk that loosening service requirements will cause uncertainty and incite new litigation over untested methods. Moreover, eliminating the requirement to tender witness fees at the time of service—allowing delay until the time of

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. Since 1987, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. LCJ's members regularly serve and receive both testimonial and documentary subpoenas, and are required to respond to them.
[2] *Preliminary Draft, Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Rules of Evidence*, 55-59 (Aug. 2025) ("Preliminary Draft"), https://www.uscourts.gov/sites/default/files/document/preliminary-draft-of-proposed-amendments-to-federal-rules_august2025.pdf.
[3] *Id*.
[4] Excerpt from the May 15, 2025, Report of the Advisory Committee on Civil Rules, Preliminary Draft at 40.

appearance—is both unworkable (many issuers do not require appearance, only documents) and contrary to the rule's deeply rooted purpose of protecting non-party witnesses.

Meanwhile, Rule 45 suffers from three serious deficiencies that genuinely demand the Advisory Committee's action: the lack of a clear requirement to pay non-parties' costs to produce documents; the absence of guidance for handling personal and confidential information belonging to subpoena recipients and data subjects; and the omission of any direction for avoiding the same costly and burdensome privilege logging requirements that prompted recent amendments to Rules 16 and 26. Rule 45's neglect of these challenging matters is causing real problems affecting countless non-parties in all types of cases.

I. AMENDING RULE 45's METHODS OF SERVICE IS UNNECESSARY AND WOULD CAUSE MORE UNCERTAINTY AND LITIGATION

The current methods of serving subpoenas that Rule 45 permits are working well; the exceptions are rare. The two "problem cases" cited by the Discovery Subcommittee[5] involve "witnesses who seem to be ducking service."[6] Such cases do not present evidence of any general problem with the rule, nor or do they involve situations in which a different rule would have led to a better result than simply adhering to the rule. The proposed Committee Note correctly acknowledges that "service of a subpoena usually does not present problems,"[7] reflecting the Discovery Subcommittee's conclusion last year that, "it seems that service of subpoenas has not presented great difficulties with frequency."[8]

Despite the weak rationale for rulemaking, the Preliminary Draft proposes to expand courts' authority to permit untested methods of service,[9] which would exacerbate the very problem the Advisory Committee seeks to abate: "wasteful litigation activity."[10] The Preliminary Draft would breed an entirely new set of ambiguities that would inevitably proliferate fights about sufficiency of service.[11] It could allow methods such as email or social media even when the

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[5] Notes of Discovery Subcommittee Teams Meeting (Aug. 19, 2024), Agenda Book, Civil Rules Advisory Committee (Oct. 10, 2024), 293, https://www.uscourts.gov/sites/default/files/2024-10_civil_rules_agenda_book_final_10-6.pdf.

[6] *Susana v. NY Waterway*, 662 F.Supp.3d 477, 477 n.1 (S.D.N.Y. 2023), recited in great detail multiple allegations of non-compliance by the plaintiff and her daughter (the intended subpoena recipient) and responded by granting summary judgment and awarding sanctions ("the Court does not find credible [the subpoenaed person's] excuse that she 'has been staying at [a different address] and has not occupied [Plaintiff's address] where the subpoena was directed' … given that she and Plaintiff have averred multiple times that they live together"). *See infra* Section II for a discussion of the other cited case.

[7] Proposed Note to Preliminary Draft, 57.

[8] Draft Minutes, Civil Rules Advisory Committee meeting Oct. 17, 2023, Agenda Book, Civil Rules Advisory Committee (Apr. 9, 2024), 67, https://www.uscourts.gov/sites/default/files/2024-04-09_agenda_book_for_civil_rules_meeting_final_4-9-2024.pdf.

[9] Preliminary Draft at 56, 58.

[10] Agenda Book, Civil Rules Advisory Committee (Apr. 9, 2024), 258. *See also* Draft Minutes, Civil Rules Advisory Committee meeting Oct. 17, 2003, Agenda Book, Civil Rules Advisory Committee (Apr. 9, 2024), 68 ("Disputes about whether a subpoena was actually served can be important, and that is the goal to be pursued.").

[11] Significantly, in 2020, the Advisory Committee examined the rules governing service of process in light of the COVID-19 pandemic and concluded that Rule 4 works well enough (although not perfectly) and that it should not be amended to allow a broader range of methods of service absent a "Civil Rules emergency." *See* FED. R. CIV. P. 87.

chance of actually reaching the intended recipient are purely speculative in the absence of any return of service.[12] The overbroad and ill-defined "reasonably calculated" standard would invite courts—largely proceeding *ex parte*—to sign off on untested methods with no idea whether they will work.[13] Those methods will be contested.

Caution is particularly imperative because Rule 45(g) authorizes contempt sanctions for a person who "fails without adequate excuse to obey the subpoena." The Advisory Committee should avoid increasing the likelihood that people who did not receive a subpoena suffer those penalties. One good feature of the Preliminary Draft is that it limits any authorization of additional methods of service only to circumstances when the methods spelled out in the current rule have been attempted in good faith and have not worked. Also, the 14-day notice requirement is helpful, as is requiring a return receipt when service is undertaken via U.S. mail and commercial carriers. These safeguards mitigate somewhat the unintended consequences that will ensue if the proposed amendment is adopted. But even if the Advisory Committee moves forward with the Preliminary Draft, one provision—allowing the delay of tendering witness fees—should be dropped to avoid significant risks of harm.

II. DELAYING THE TENDERING OF WITNESS FEES WOULD REDUCE COMPLIANCE, HURT WITNESSES, AND CAUSE CONFUSION

There is scant, if any, evidence that Rule 45's language about tendering fees causes problems with the service of subpoenas. In the "one recent reported decision" concerning witness fees alluded to in the memo accompanying the Preliminary Draft,[14] the plaintiffs attempted to serve a non-party witness personally 23 times and then by certified mail and FedEx—but none of those attempts included the witness fee.[15] Had a check been included, in accordance with the Rule, the court's finding as to sufficiency may have been different—but the realities of the case likely would not have changed. The witness, according to a neighbor, "doesn't talk to anyone" and "will not come to the door for anyone."[16] This unfortunate circumstance is hardly a clarion call for a rule amendment. Similarly, the other case mentioned in the memo accompanying the Preliminary Draft also invites a simple remedy. The server in that case "did not initially deliver the witness fee check because it had the server's information on it and the server worried for his personal safety if that were revealed to the witness."[17] That problem is easily avoided by not putting the server's personal information on the check—a corrective that does not implicate

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[12] Lawyers for Civil Justice, Rules Suggestion, *Amending Rule 45: Why Expanding the Reach and Methods of Service of Subpoenas Should Not Render the Rule's Witness Protections Empty Words* (Mar. 7, 2025), https://www.uscourts.gov/sites/default/files/2025-03/25-cv-f_suggestion_from_lcj_-_rule_45_1.pdf.

[13] The Preliminary Draft's test for the new case-by-case approach is "reasonably calculated to give notice"—a lesser standard than actual notice. The difficulties inherent in a "reasonably calculated" standard are reflected in the Advisory Committee's recent decision to authorize service of process under a "reasonably calculated to give notice" standard *only when* the Judicial Conference declares "a Civil Rules emergency" due to "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court." Fed. R. Civ. P. 87. Although some differences exist between service of process and service of subpoenas, since Rule 45 primarily applies to non-parties, anything that lessens Rule 45's protections should entail heightened caution.

[14] Excerpt from the May 15, 2025, Report of the Advisory Committee on Civil Rules, Preliminary Draft at 40.

[15] *Brewer v. Town of Eagle*, 663 F.Supp.3d 939, 941-44 (E.D. Wis. 2023).

[16] *Id.* at 942.

[17] Excerpt from the May 15, 2025, Report of the Advisory Committee on Civil Rules, Preliminary Draft at 40.

anything in Rule 45 or present a "rules problem" for which a rule amendment is needed or justified, especially when weighed against the unintended negative consequences.[18]

Absent convincing examples, the case for amending the tendering of witness fees is the notion that "this seems an antiquated requirement,"[19] an observation that blithely disregards that the witness fee is an important safeguard deeply rooted in the rule's history and purpose of protecting against abuse. Further, allowing delay in tendering fees would be unworkable in practice because: (1) many subpoenas calling for depositions do so only to obtain documents, and no deposition ever actually occurs, and (2) many subpoenas for trial may not result in an actual appearance, since most cases settle before trial.

The current requirement to tender witness fees at the time of service still yields the most "precise and predictable outcome—either the party [serving the subpoena] pays fees or the subpoena is procedurally invalid."[20] It encourages compliance and protects witnesses from having to bear the burdens of someone else's lawsuit. The Preliminary Draft's proposal to allow delay in tendering fees would likely reduce compliance while harming non-party witnesses by requiring them to "front" discovery costs and rely for recovery of those costs on the good faith of the subpoenaing party. Courts have correctly refused to force witnesses to gamble on the honor of litigants.[21] Moreover, litigants may have incentives to evade responsibility for those costs or to impose pressure on non-parties to help their side of the case. A non-party witness could well travel for his or her deposition, answer questions for seven hours, and leave without any fees because the subpoenaing party was not satisfied with the responses. Putting the onus on witnesses to move for fees would be requiring more time and money than it is worth on a case in which they likely have no stake.

Delaying the tendering of witness fees undermines the Rule's stated purpose of protecting witnesses. It also invites gamesmanship by the subpoenaing party. This would be a step backward and should be dropped from the Preliminary Draft. Instead, the Advisory Committee should move in the opposite direction and take a crucial step forward to modernize the rule's protections by explicitly requiring issuers to pay for the expenses of the productions that they demand.

III. RULE 45 SHOULD REQUIRE REIMBURSEMENT FOR EXPENSES INCURRED TO PRODUCE DOCUMENTS, ESI, AND TANGIBLE THINGS

The Advisory Committee revised Rule 45 in 1991 to "clarify and enlarge the protections" afforded to non-parties, including adding paragraph (d)(1) to require that subpoena issuers "must

[18] The Advisory Committee's "usual approach" to developing rule amendments is "identifying a real-world problem and then assessing whether the problem is amenable to a rules-based solution and what the consequences of such a solution might be." Civil Rules Advisory Committee, Agenda Book (Apr. 1, 2025), 81, https://www.uscourts.gov/sites/default/files/2025-03/2025-04-civil-rules-committee-agenda-book-final-updated-3.28.25.pdf.

[19] Agenda Book, Civil Rules Advisory Committee (Oct. 17, 2023), 288.

[20] *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 212 F.R.D. 429, 430 (D.D.C. 2003).

[21] *See, e.g., Klockner Namasco Holdings Corp. v. Daily Access.com, Inc*., 211 F.R.D. 685, 687 (N.D. Ga. 2002) (a third-party witness "is not required to rely on the good faith of the party who subpoenas him to pay the fees when he appears."); *In re Food Supplement Co.,* 33 B.R. 188, 189 (Bankr. S.D. Fla. 1983) (same).

take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena" and paragraph (d)(2)(B)(ii) protecting non-parties from any "significant expense resulting from compliance."[22] In the intervening 34 years, two tectonic events have undermined the Rule's ability to achieve this purpose and thus created a "rules problem" requiring an amendment.

A. The Information Age Has Overwhelmed Rule 45's Protection Against "Significant Expense"

The information age has caused a discovery revolution that has multiplied the burdens of document production manyfold. The Advisory Committee is well aware of this fact and has undertaken numerous efforts since 1991 to modernize other FRCP provisions, but not Rule 45.[23] The 1991 protections were focused on "misuse" of the subpoena power, but today, the reality of e-discovery means that even the *legitimate* use of subpoenas puts undue burdens on many subpoena recipients—the people who, in the Advisory Committee's words, face "significant expense resulting from involuntary assistance to the court."[24] The Rule's purported remedy—allowing the subpoena recipient to move to quash or modify a subpoena—is not only burdensome in itself[25] but also may not be appropriate when the information sought is legitimately needed but expensive to produce. The data revolution has rendered Rule 45 no longer capable of upholding its foundational principle, reasserted in in 1991: that innocent bystanders should not be required to pay significant discovery expenses for litigation in which they have no stake.

B. Courts Have Effectively Rewritten Rule 45's Protection Against "Significant Expense"

The second reason that Rule 45's protections no longer reflect the Advisory Committee's intent is that courts have effectively rewritten the rule by inserting a discretionary means test that neither the Rule's text nor its history support. This is largely due to an opinion from the *Exxon Valdez* litigation[26] that imposed a three-factor test on Rule 45 non-parties seeking to recoup their costs: whether the non-party has an "interest in the outcome"; whether it could "more readily

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[22] FED. R. CIV. P. 45; *see also* FED. R. CIV. P. 45 advisory committee notes to 1991 amendment.

[23] The focus of the 2006 amendment to Rule 45 was to "conform the provisions for subpoenas to changes in the other discovery rules, largely related to discovery of electronically stored information." Fed. R. Civ. P. 45 advisory committee notes to 2006 amendment. Although the Advisory Committee acknowledged the burdens of ESI discovery on non-parties, it reiterated rather than materially revised Rule 45's protections:

> As with discovery of electronically stored information from parties, complying with a subpoena for such information may impose burdens on the responding person. Rule 45(c) provides protection against undue impositions on nonparties. For example, Rule 45(c)(1) directs that a party serving a subpoena "shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and Rule 45(c)(2)(B) permits the person served with the subpoena to object to it and directs that an order requiring compliance "shall protect a person who is neither a party nor a party's officer from significant expense resulting from" compliance.

Id.

[24] FED. R. CIV. P. 45 advisory committee notes to 1991 amendment.

[25] *See, e.g., Tucker v. Am. Int'l Grp., Inc.,* 281 F.R.D. 85, 98-99 (D. Conn. 2012) (denying motion to compel when burden and expense of retrieving electronic records imposed on non-party outweighed benefit to plaintiff).

[26] 142 F.R.D. 380, 383 (D.D.C. 1992).

bear" the production expense than the requesting party; and whether the litigation involves matters of "public importance."[27] In a textbook example that "hard facts make bad law," courts have readily copied this rubric in ordinary cases, projecting onto Rule 45 a convention for allocating the burdens of subpoena compliance that ignores the Rule's actual "significant expense" test. For example:

- In *Tessera v. Micron Technology*,[28] a routine patent case, the court assessed the "relative resources of the party and the non-party" in determining whether and to what extent the requesting parties should bear the cost of Rule 45 compliance;
- In *Seroquel Products Liability Litigation*,[29] an MDL court held that, regardless of significance, the costs of compliance under Rule 45 "can certainly be borne" by a non-party that was "the thirteenth largest market research firm in the world"[30];
- In *Cornell v. Columbus McKinnon*, an ordinary personal injury case, the court refused to protect the non-party subpoena recipient, the plaintiff's employer, from the costs of compliance because they were "dwarfed by" the third-party's "profit figures," a factor which "weigh[ed] in favor of finding them insignificant."[31] In doing so, the court found that "Fortune 500" companies were "quite unlike" the type of non-party entity contemplated by the 1991 amendment to Rule 45[32]; and
- In *Koopmann v. Robert Bosch*,[33] the court decided that the requesting party need only "bear half the cost of compliance" because the "non-party can more readily bear the costs than the requesting party."

These cases and others like them[34] have effectively rewritten Rule 45(c)(2)(B) to mean something other than what it says. In *Volt Power v. Butts*, the court found that "neither the text of the Rule, nor the Advisory Committee Notes require the court to consider the responding party's financial means."[35] *United States v. McGraw-Hill Cos.*, held that, under Rule 45, the costs should fall on the party to the suit, rather than the non-party, to the extent the expenses are significant.[36] In *OL Priv. Couns., LLC v. Olson*, the court held that Rule 45 requires relief from

[27] *Id*.
[28] No. C06-80024MISC, 2006 WL 733498, at *10 (N.D. Cal. Mar. 22, 2006).
[29] No. 6:06-md-1769-Orl-22DAB, 2007 WL 4287676 (M.D. Fla. Dec. 6, 2007).
[30] *Id*. at *3-5.
[31] No. 13-cv-02188-SI, 2015 WL 4747260, at *4 (N.D. Cal. Aug. 11, 2015).
[32] *Id.* at *3-4.
[33] 18-CV-4065 (JMF), 2018 WL 9917679, at *1 (S.D.N.Y. May 25, 2018).
[34] *See, e.g., In Re Epipen*, MDL No. 2785, 2018 WL 3240981, at *4 (D. Kan. July 3, 2018) (requiring the producing party to "bear 50% of the reasonable costs"); *Gamache v. Hogue*, No. 1:19-CV-21 (LAG), 2023 WL 2658034, *6 (M.D. Ga. Mar. 15, 2023) (requiring producing non-party to "cover" one-third of the costs). No fewer than fifty-five cases have cited the relevant Westlaw headnote in *Exxon Valdez*.
[35] No. 7:19-CV-00149-BO, 2021 WL 4188428, at *2 (E.D.N.C. Aug. 17, 2021) ("the Rule does not carve out an exception to its fee-shifting provision").
[36] 302 F.R.D. 532, 535 (C.D. Cal. 2014) ("The drafters intended for costs to be more routinely shifted, i.e. not subject to equitable balancing by the courts, in order to avoid burdening non-parties who are compelled to assist the court by giving information or evidence." (internal citation and quotes omitted)). *See also Magna Mirrors of Am., Inc. v. Pittsburgh Glass Works LLC*, No. 2:12-mc-359, 2012 WL 4904515, at *3 (M.D. Pa. Oct. 15, 2012) (ordering the issuing party to bear all costs of complying with subpoena).

"significant expense" even if there is no "undue burden."[37] And *Legal Voice v. Stormans*[38] determined that only two considerations are relevant: "(1) whether the subpoena imposes expenses on the non-party, and (2) whether those expenses are significant." These cases honor the text of Rule 45, which needs to be amended to reaffirm that, as one court noted, the equitable factors tests did not "survive the 1991 amendments."[39]

C. The Advisory Committee Should Restore and Modernize the Rule

Professor Brian Fitzpatrick explains in his Rules Suggestion[40] that, although Rule 45 should not saddle non-parties with the expense of complying with subpoenas, the mechanisms of Rule 45 "rarely make non-parties whole anymore,"[41] demonstrating that the rule has become inconsistent with its original design.[42] When Rule 45 forces non-parties, who are typically dragged into litigation through no fault of their own, to shoulder the parties' litigation costs, it both creates inefficiencies and inequities that the FRCP should not abide and encourages overreaching discovery demands. The rule should not put non-parties between the Scylla of expensive compliance and the Charybdis of costly and potentially time-consuming motion practice in the hope of relief. Moreover, an explicit reimbursement requirement is not only a matter of fairness to non-parties, but also a tool for streamlining litigation. A clear rule would reduce the number of motions to quash, motions to compel, and motions for protective orders that consume judicial resources and lawyer time.

Specifically, in the spirit of rectifying Professor Fitzpatrick's observation that the Rule rarely makes non-parties whole, Rule 45(d)(2)(B)(ii) should be amended to require reimbursement to non-parties for all reasonable costs resulting from compliance, absent good cause. Such an amendment could look like this:

> (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from ~~significant~~ any reasonable expenses resulting from compliance, absent good cause.[43]

The accompanying Advisory Committee Note could explain that a good cause for reducing or disallowing the reimbursement might exist if the non-party has a disqualifying interest in the outcome of the litigation. However, good cause is not satisfied by the absolute or comparative size of the resources available to the non-party nor the degree to which the underlying litigation

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[37] Case No. 2:21-cv-00455, 2024 WL 4839277, at *3 (D. Utah Nov. 20, 2024)("Rule 45(d)(2)(B)(ii) protects a nonparty from any "significant expense" incurred in complying with an order to produce discovery" even absent a showing of "undue burden.").
[38] 738 F.3d 1178, 1185 (9th Cir. 2013).
[39] *U.S. v. McGraw-Hill*, 302 F.R.D. 532, 535 (C.D. Cal. 2014).
[40] Letter from Brian Fitzpatrick, Milton R. Underwood Chair in Free Enterprise and Professor of Law, Vanderbilt Law School, to Secretary, Committee on Rules of Practice and Procedure (Mar. 5, 2025), https://www.uscourts.gov/sites/default/files/2025-03/25-cv-e_suggestion_from_brian_fitzpatrick_-_rule_45.pdf.
[41] *Id.*
[42] Rule 45(b)(2) of the original 1938 Federal Rules permitted courts to require advance payment of reasonable production costs before enforcing a subpoena duces tecum. Before its deletion in 1991, the rule allowed a court to deny a motion to quash or modify if the party requesting the subpoena paid these costs. *See Amendments to Federal Rules of Civil Procedure,* 134 F.R.D. 525, 659 (1991) (1991 Amendments).
[43] *See* Exhibit A.

may be of public interest.

Such an amendment would restore the intent of the rule, modernize it to the realities of today's discovery, and reaffirm Rule 45's core promise: the power to compel discovery is not a license to burden third-party bystanders—no matter who they are—with "significant expense resulting from involuntary assistance to the court."[44]

Critics of this approach might suggest that reimbursement will invite expensive production—not so. Reasonable expenses are those that are necessary and proportional to the needs of the subpoena; non-incremental overhead costs would not ordinarily qualify. Courts are well acquainted with reasonableness standards for discovery expenses. A well-drafted amendment would deter over-spending rather than encourage it. Moreover, clear reimbursement reduces—not increases—satellite litigation and perverse incentives. Today, the absence of a predictable reimbursement incentivizes parties to externalize costs onto non-parties, and forces recipients either to over-litigate objections or to absorb substantial expenses. A mandatory reimbursement standard would encourage requesting parties to narrow the scope of their requests and focus non-parties on efficient compliance because only their reasonable costs will be repaid.

IV. RULE 45 SHOULD PROVIDE GUIDANCE FOR THE PROTECTION OF PERSONAL AND CONFIDENTIAL INFORMATION

Rule 45 is failing to provide basic direction to courts, parties, and non-parties for navigating the increasingly complicated conflict between discovery demands, information security, and privacy rights. Specifically, Rule 45 contains no guidance for protecting the privacy rights or security interests of: (1) the non-party that receives a subpoena for its data or (2) other non-parties whose personal information is contained within material requested or subpoenaed from a different non-party. While the need for such guidance may not have been compelling when the Advisory Committee last amended Rule 45 in 1991, today it is essential.[45]

The amount of data now available about individual people is massive and continues to grow. Critically, most of this data is not held by the people to whom the data pertains—so called "data subjects"—but rather by other third parties. Cloud providers host people's photos and documents, health apps store medical information, search engines store search histories, internet service providers store emails and instant messages, car companies store location data and driving information, and financial institutions store creditworthiness data—and the types and amounts of data continue to grow. Yet Rule 45 provides no guidance or guardrails for the protection of non-parties' well-established privacy rights when their data is subpoenaed. Nor does Rule 45 help protect a subpoenaed person's or entity's privacy interests or consider cyber security risks that could cause terrible embarrassment, destroy the data's value, or expose the subpoenaed person to liability.

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[44] FED. R. CIV. P. 45 advisory committee notes to 1991 amendment.

[45] Other FRCP rules also require revision for similar reasons. *See* Lawyers for Civil Justice, Rules Suggestion, *Reasonable Steps: Four Critical FRCP Updates for Managing Privacy and Cyber Security*, 9 (Mar. 3, 2025), https://www.uscourts.gov/sites/default/files/2025-03/25-cv-d_suggestion_from_lcj_-_privacy_rights_and_cyber_security_risks.pdf.

Rule 45 does not even mention privacy or cyber security. Its requirement for "reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena"[46] is too antiquated and imprecise to handle these problems. In fact, Rule 45 is affirmatively compromising the rights of non-parties by providing a vehicle for forcing disclosure of non-party data and copying it *en masse* into the litigation ecosystem to be used in ways the non-party and non-party data subjects never intended—usually without their knowledge. The rule's only remedy—allowing motions to quash and for protective orders—is not only unfair because it puts the burden solely on subpoena recipients who are often innocent bystanders to the litigation or holders of information that relates to others,[47] but also unworkable because non-party data subjects rarely know their information is being sought and disclosed. It is highly inefficient to require motion practice to limit the production of private or confidential information, to enforce reasonable cybersecurity measures to protect such information, and to impose basic data privacy principles like purpose limitations, anonymization, and data minimization, when Rule 45 guidance would obviate or significantly reduce the need for such litigation.

Rule 45 should be amended to incorporate clear standards for privacy and cybersecurity protections and define issuing parties' responsibilities to non-parties—both the non-parties who are directly subpoenaed and those whose data is the subject of a subpoena served on someone else. The Rule should clarify that issuers of subpoenas have the same basic responsibility to exercise due care in the scope of information they request[48] and in the handling of personal and confidential data they receive as is already imposed on those who hold this data in the first instance. Additionally, the Rule should reflect that both the party issuing a subpoena and the non-party entity responding to a subpoena are obligated to protect the privacy rights of absent non-party data subjects whose data will be produced but who will have no notice and thus no opportunity to protect their own interests. In other words, Rule 45 should be amended to clarify that protecting "a person subject to the subpoena" includes taking reasonable steps to protect private and confidential information, including information the subpoena recipient holds about other non-parties. A suggestion for specific rule amendment language is attached as Exhibit B.

V. RULE 45 SHOULD PROVIDE GUIDANCE FOR AVOIDING THE PERVASIVE BURDENS OF PRIVILEGE LOGGING

Many courts misunderstand Rule 45(e)(2)(A) to require non-parties to provide privilege logs—and specifically, document-by-document logs.[49] Unfortunately, the same *de facto* default to "document-by-document" overlogging that occurs under Rule 26(b)(5)(A),[50] requires many non-

[46] FED. R. CIV. P. 45(d).
[47] Babette Boliek, *Prioritizing Privacy in the Courts and Beyond*, 103 Cornell L. Rev. 1101, 1108 (2018) ("private litigants may have little incentive to incur security costs to protect third-party information").
[48] *See* MODEL RULES OF PROF'L CONDUCT r. 4.4(a) (AM. BAR ASS'N 1983) ("a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [third parties]).
[49] *See, e.g., Midland States Bank v. Ygrene Energy Fund, Inc.*, No. 4:21-CV-00354 JAR, 2022 WL 2915553, at *3 (E.D. Mo. July 5, 2022) ("Rule 45's privilege log requirement"); *Relevant Grp., LLC v. Nourmand*, CV 19-5019-ODW (KSx), 2021 WL 9696765, at *4-5 (C.D. Cal. July 26, 2021) (rejecting multiple arguments that a document-by-document log should not be required and claiming an "aggregate" (categorical) log can never satisfy Rule 45).
[50] Lawyers for Civil Justice, Public Comment, *The Direct Approach: Why Fixing the Rule 26(b)(5)(A) Problem Requires an Amendment to Rule (b)(5)(A)*, (Oct. 4, 2023), https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0007.

parties to produce costly, burdensome, and often worthless privilege logs. Despite the Advisory Committee's recent work to address the often-outsized burdens of privilege logging procedures via amendments to Rules 16(b)(3)(B)(iv) and 26(f)(3)(D), the problems faced by non-party recipients of Rule 45 subpoenas remain unaddressed—primarily because non-parties typically do not participate in pre-trial conferences. Several public comments urged the Advisory Committee to amend Rule 45 during its rulemaking on privilege logs,[51] but the Advisory Committee opted to postpone any action until a future time when Rule 45 is under review. Now is the time.

Rule 45 does not mention privilege logs. Instead, it requires that subpoena recipients who withhold privileged material "must expressly make the claim" and "describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim."[52] This requirement should be balanced and proportional, imposing neither an "undue burden" nor an unreimbursed "significant expense." But the Advisory Committee Note to the 1991 Amendment focuses narrowly on one small aspect of the problem: overbroad subpoenas. It says:

> A person served a subpoena that is too broad may be faced with a burdensome task to provide full information regarding all that person's claims to privilege or work product protection. Such a person is entitled to protection that may be secured through an objection made pursuant to paragraph (c)(2).[53]

Non-parties need options for compliance even when subpoenas are not overbroad.[54] Sedona's *Commentary on Privilege Logs* notes that "some courts have permitted non-parties to substantiate their assertions of privilege through other, less burdensome means than a traditional privilege log."[55] The Sedona *Commentary* explains a variety of ways that the burdens associated with privilege logging can be mitigated.[56] The suggestions echo those that LCJ, Robert Keeling, Judge Facciola, Jonathan Redgrave, and numerous others submitted to the Advisory Committee in the context of a possible amendment to Rule 26(b)(5)(A).

Rule 45 should be amended to provide guidance and protection to non-parties facing Rule 45 subpoenas, including: (1) stating that document-by-document privilege logging is not required and alternative log formats may be equally if not more reasonable; (2) recognizing that certain

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[51] *See id* at 8.
[52] FED. R. CIV. P. 45 (E)(2)(A).
[53] Fed. R. Civ. P. 45 advisory committee notes to 1991 amendment.
[54] "Complying with a subpoena will almost always require some production-related tasks like . . . creating a privilege log." *Gamefam, Inc. v. WowWee Grp. Ltd.*, No. 23-MC-80310-SI, 2024 WL 1181001, at *6 (N.D. Cal. Mar. 18, 2024) (quoting *Stormans, Inc. v. Selecky*, No. C07-5374 RBL, 2015 WL 224914, at *5 (W.D. Wash. Jan. 15, 2015)).
[55] The Sedona Conference, *Commentary on Privilege Logs*, 25 SEDONA CONF. J. 221, 244-45 (May 2024) (citing *Lake v. Charlotte Cty. Bd. of Cty. Comm'rs*, Case No. 2:20-cv809-JLB-NPM, 2021 WL 2351178, at *2 (M.D. Fla. June 9, 2021) ("[R]ather than require [subpoenaed persons] to produce privilege logs of withheld or redacted materials, they may categorically withhold or redact privileged communications, and must provide a certification by both the subpoenaed party and [plaintiff] that none of the withheld or redacted documents were distributed to or reviewed by anyone other than [plaintiff], [plaintiff's] counsel, [subpoenaed persons], or their respective staffs. Alternatively, if the subpoenaed party or [plaintiff] refuse to provide such a certification, then the subpoenaed party must produce a privilege log in compliance with Rule 45(e)(2)(A)(i)-(ii).").
[56] *See id*.

categories of documents (e.g., communications with counsel after the filing of the compliant) do not require logging absent compelling circumstances; and (3) defining the expenses of document-by-document logging as a "significant expense" and therefore compensable by the subpoena issuer. Such a rule would be well within the mainstream of jurisprudence.[57]

Non-parties facing the prospect of producing privilege logs pursuant to Rule 45 have an equal, if not greater, need for guidance and protection as parties, but the forthcoming amendments to Rules 16 and 26 will not help. The Advisory Committee should complete its work on privilege logs by promulgating an amendment to Rule 45 to provide non-parties appropriate guidance and protection.

CONCLUSION

The Advisory Committee should drop the provision allowing delay in the tender of witness fees from the Preliminary Draft because the unintended consequences are high and the case for the amendment is thin at best. Similarly, no amendment is needed to broaden the methods of subpoena service because anecdotes about people ducking service, although unfortunate, do not present a "rules problem" that will be solved by rulemaking or that is worth the unintended consequence of inciting litigation over unproven methods of service.

Instead, the Advisory Committee should write an amendment to remedy Rule 45's genuine deficiencies. Non-parties routinely face significant, unreimbursed compliance costs that can impose substantial burdens. Rule 45 does not provide them, nor courts and parties, with meaningful guidance for protecting private and confidential information held by subpoena recipients. And unlike parties, non-party subpoena recipients cannot rely on the forthcoming Rule 16 and 26 amendments to facilitate negotiations over reasonable privilege logging procedures. These three topics are real problems that affect thousands of cases and countless non-parties who deserve better protection from a rule that increasingly governs high-stakes, high-cost discovery disputes.

[57] Some courts find that "expenses" subject to cost-shifting can include privilege review and logging. *See, e.g., Hinterberger v. Am. Nurses Assn.*, 643 Fed. Appx. 310, 314 (4th Cir. 2016) (affirming magistrate judge's determination that expenses for privilege review and e-discovery services were properly shifted); *Gamefam,* 2024 WL 1181001, at *8 ("Courts in this circuit have concluded that fees incurred in production-related tasks, including creating a privilege log, are compensable expenses resulting from subpoena compliance.").

Exhibit A

Rule 45. Subpoena

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(d) Protecting A Person Subject To A Subpoena; Enforcement.

***

(1) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required.

***

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from ~~significant~~ any reasonable expenses resulting from compliance, absent good cause.

Exhibit B

Rule 45. Subpoena

***

(d) Protecting A Person Subject to a Subpoena; Enforcement.
(1) Avoiding Undue Burden or Expense; Sanctions.
(A) 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, to minimize the amount of personal information requested to only that which is absolutely necessary to effectuate the purpose for which the subpoena is to be issued, and to protect personally identifiable or confidential information against unauthorized access or use.
(B) The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings, and reasonable attorney's fees, costs, and expenses incurred by the responding party or any individual person harmed as a result of noncompliance—on a party or attorney who fails to comply.

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(3) Quashing or Modifying a Subpoena

(B) When Permitted. To protect a persona subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

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

***

TAB 10

HAGENS BERMAN

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January 16, 2026

VIA EMAIL

Rules Committee Secretary
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Amendment to Rule 45(c) – Subpoena (Place of Compliance)

Dear Committee Members:

Thank you for the opportunity to testify in support of the proposed amendment to Rule 45(c). I contributed to the January 2024 proposal that prompted the Committee to consider revisions to the rule, and I thank the members of the Civil Rules Advisory Committee, and particularly the members of the Rule 43/45 Subcommittee, for their diligence and thoughtful consideration of this matter over the last two years.

The proposed amendment and accompanying Committee Note effectively clarify that the 2013 amendments empowered courts to compel witnesses to provide remote trial testimony, when the requirements of Rule 43(a) have been satisfied, from any location within the geographic limitations of Rule 45(c)(1). The amendment should promptly correct the line of cases, bolstered by the Ninth Circuit's holding in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023), that has interpreted Rule 45(c)'s 100-mile limit as applying to the courthouse where the trial is held, not the location from which a witness provides remote testimony, precluding courts from compelling remote trial testimony from distant witnesses. Conflicting views on the scope of the remote trial subpoena power have created costly uncertainties for litigants, unnecessarily burdened trial courts with time-consuming disputes, and enabled litigants to game the Rules to shield inculpatory witnesses from trial.

To the extent I have any reservations about the proposed amendment, they are limited to the final sentence of the third paragraph of the Committee Note, which provides that "such remote testimony occurs in the court where the trial or hearing is conducted." While the point of this

sentence is clear when read in tandem with the text of Rules 43 and 77(b), a less careful reader could understand it to support *Kirkland*'s definition of "place of compliance," undermining the goal of the amendment. A minor revision, such as replacing "occurs" with "is presented" or "is offered," could avoid any potential confusion.

Lastly, while the proposed amendment is an important step in modernizing civil trial practice, litigants' ability to present remote trial testimony will continue to be constrained by the stringent standard of Rule 43(a) and the accompanying notes' directive that deposition video is the "superior means of securing the testimony of a witness" who cannot testify live in person. Amendments to Rule 43(a) are necessary to make remote live testimony the preferred alternative for witnesses whose in-person attendance at trial cannot be secured, which will enhance the truth-seeking function of our civil justice system, reduce the costs and increase the efficiency of civil litigation, and promote justice by maximizing access to evidence.

***

In sum, I support the Committee's proposed changes to Rule 45(c) and commend the Committee for the significant attention it has devoted to, and continues to give, these important matters. Thank you for the chance to speak with you about this amendment.

Sincerely,

/s/ Rachel A. Downey

Rachel A. Downey

TAB 11

December 29, 2025

VIA E-MAIL

Rules Committee Staff | Office of the General Counsel
Administrative Office of the U.S. Courts
One Columbus Circle NE | Room 7-300
Washington, DC 20544

Re: Opposition to proposal to amend Federal Rule of Civil Procedure 45(c)

Dear Rules Committee Staff:

We write in opposition to the proposed amendment to Rule 45(c). We represented the petitioners in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023), and are familiar with the issues raised by the proposal. Mr. Fleischman intends on testifying at the January 27, 2026, hearing concerning the amendment. Please consider this letter his written submission.

The proposal is a solution in search of a problem: existing Rule 45(c) works well and promotes the truth-seeking function of trials. From the time the Federal Rules of Civil Procedure were adopted in 1938, there has been a geographical limitation on a federal district court's subpoena power in civil cases. Today, that limit is 100 miles from the place of trial, or anywhere within the state where the witness resides. *See* Fed. R. Civ. P. 45(c). If the witness (whether a party or nonparty) is outside the subpoena power, the parties can use the witness's deposition testimony (often videotaped) at trial. No one is deprived of the opportunity to call witnesses or present testimony.

The current proposal appears to presume that live Zoom testimony is superior to videotaped deposition testimony. We are dubious; there are pros and cons to both approaches. But any difference between live Zoom testimony and videotaped deposition testimony is marginal at best and does not justify upending a century of practice. *See Est. of Spear v. C.I.R.*, 41 F.3d 103, 116 (3d Cir. 1994) (explaining that while "live testimony is generally preferable to videotaped testimony, the absence of such testimony, even from a key witness, is only minimally prejudicial when that witness is adverse and when there is a videotaped deposition that can be introduced in lieu of live testimony"). Moreover, if live testimony by Zoom were the panacea its proponents claim, one would expect that district judges would always grant Rule 43 requests. But they don't. *See, e.g.*, *Eller v. Trans Union, LLC,* 739 F.3d 467, 477 (10th Cir. 2013) (affirming denial of Rule 43(a) request); *Bioconvergence LLC v. Attariwala*, 2023 WL 4494020, at *3 (S.D.

Ind. June 29, 2023); *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices & Antitrust Litig.*, 2021 WL 2822535, at *5 (D. Kan. July 7, 2021), *id.* at *6 ("a party's inability to elicit live testimony from a witness outside the court's subpoena power occurs all the time and does not present a compelling circumstance when the party can introduce deposition testimony instead").

The original proposal complained about district courts having to rule on written objections to deposition testimony. But the alternative is worse: ruling on objections during trial, with a jury present, with a witness on Zoom who needs to be screened, multiplying the need for sidebar conferences that annoy jurors and disrupt attention spans. Objections to deposition testimony may be ruled on before trial or outside the jury's presence, so the testimony can be played for a jury later without interruption. Also, videotaped depositions are frequently played for juries during gaps in testimony from live witnesses to complete a day's schedule without interruption.

The current proposal is justified by the Committee Note to the 2013 amendments to Rule 45 that created "nationwide *service* of [a] subpoena." (Emphasis added.) This justification is unpersuasive, however. There is a significant difference between *service* and the *scope* of the court's subpoena power. The 2013 amendments eliminated the procedural need to file an action in the local district court where the witness was located (to put that case number on the subpoena technically "issued" from the local district court) before serving the subpoena. But the geographical limitations on the *scope* of a trial subpoena remained in Rule 45(c), as well as the ability of the witness to seek relief from a local district court under Rule 45(f) (although that court retains discretion to transfer the matter to the issuing court).

Two additional points merit consideration:

Burden. The proposal seeks to balance the comparative burdens of testifying remotely by Zoom and traveling to a courthouse. But that is only one form of burden applicable here. The other form of burden, which the subcommittee appears to have overlooked, is the burden of forcing a witness to testify twice—first at a deposition, and then at trial. Keep in mind that trial subpoenas are typically needed only when a witness, whether a party or non-party, is unwilling to testify voluntarily. And the burden is even greater for non-party witnesses who have no interest in the outcome of the litigation and who may have to retain counsel.

The proposal thus creates the potential for abuse. For example, take mass tort litigation, now the largest component of district courts' dockets via the MDL process. A witness will typically be deposed once in a coordinated proceeding and then that deposition testimony is used in trials throughout the nation if the witness is outside the court's subpoena powers and does not voluntarily appear at trial. Under the proposed amendment, that same witness, who has already been deposed, can now be compelled to testify a second time by Zoom in dozens or hundreds of cases around the country, all without meaningful compensation (unless they are an expert, in which case they typically appear at trial voluntarily). (Think of the retired chemist residing in Florida, wanting to spend time with grandchildren, having to testify by Zoom in every toxic tort MDL trial anywhere in the nation involving their former employer.)

Unavailability. If adopted, the proposed amendments to Rule 45(c) would mean any witness in the United States, or indeed anywhere in the world, would no longer be unavailable to testify at trial. When a witness, whether or not a party, is unavailable to testify at trial, the current rules already address that issue. For example, Federal Rule of Civil Procedure 32(a)(4)(B) provides that a party may present deposition testimony at trial because he is "more than 100 miles from the place of hearing or trial." The geographical limitation in Rule 32(a)(4)(B) works in tandem with the current geographical limitations on trial subpoenas in Rule 45(c); if the witness is deposed, but is more than 100 miles from the "place of the hearing or trial," then deposition testimony can be used at trial. *See Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1019 (9th Cir. 2004) ("Feist's residence in Alabama placed him outside of the court's subpoena power under Fed.R.Civ.P. 45, and he was thus unavailable pursuant to Fed.R.Civ.P. 32(a)[(4)(B)], which permits deposition testimony where 'the witness is [more] than 100 miles from the place of trial or hearing.'"). Similarly, Federal Rule of Evidence 804(b)(1) creates an exception to the hearsay rule when a witness is "unavailable" under Rule 804(a). Being outside the court's subpoena powers satisfies that criterion. *See United States v. Olafson*, 213 F.3d 435, 441 (9th Cir. 2000) (holding witnesses outside subpoena power are unavailable under Rule 804); *In re Screws Antitrust Litig.*, 526 F.Supp. 1316, 1317 (D. Mass. 1981) (holding witness unavailable for trial in Massachusetts where he resided in North Carolina).

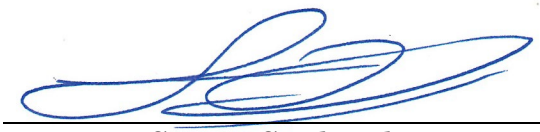
Our concern is that amending Rule 45(c) without amending these other provisions will create confusion between Rules or render some superfluous. We understand that the committee intends to address this issue in a Committee Note to accompany Rule 45. We question whether a note is sufficient to address this point

and, in any event, the current version of the proposed Committee Note contains no such language.

We thank the committee for its attention to this matter.

Very truly yours,

HORVITZ & LEVY LLP
JASON R. LITT
PEDER K. BATALDEN
STEVEN S. FLEISCHMAN

By: 
Steven S. Fleischman

TAB 12

No written testimony outline or comment
was submitted by the requested January 16, 2026
deadline.

TAB 13

No written testimony outline or comment was submitted by the requested January 16, 2026 deadline.

TAB 14

Outline of Planned Testimony
Before the Advisory Committee on Civil Rules
January 27, 2026

Witness:

Robert Levy, Executive Counsel, Exxon Mobil Corporation, Spring, Texas

Rules to be Addressed:

Proposed Amendments to Federal Rules of Civil Procedure Rules 7.1, 26(a)(3)(A)(iii), 45(b)(1), and 45(c)(2)

I. Introduction

My name is Robert Levy, I am currently Executive Counsel for Issues and Advocacy, Exxon Mobil Corporation. I submit this statement in response to the Committee's proposed amendments to Federal Rules of Civil Procedure 7.1, 26(a)(3)(A)(iii), 45(b)(1), and 45(c)(2). My comments focus on ensuring that the proposed amendments further the goals of transparency, fairness, and judicial efficiency without undermining long-settled limits on subpoena power, witness burden, and substantive rights, particularly those of non-parties.

II. Proposed Amendments to Rule 7.1 – Party Disclosures

a. Need for Defined Terms

The proposed amendments to Rule 7.1 would benefit significantly from the inclusion of defined terms. In particular, the Committee should clarify:

- "Business organization"
- "Direct" and "indirect" interests
- "Parent," "grandparent," (as referenced in the Committee Note)

Without definitions, parties will face unavoidable uncertainty as to the scope of their disclosure obligations, leading to uneven compliance and inconsistent judicial treatment.

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b. Judicial Recusal and Material Omissions

The stated objective of the proposed amendment—to provide judges with information necessary to identify potential conflicts of interest and recusal obligations—is appropriate and important. See 28 U.S.C. § 455 (governing judicial disqualification).

Judges should, to the extent possible, proactively avoid situations requiring recusal, including by refraining from holding publicly traded securities of business organizations that appear as litigants.

However, the proposal contains a significant omission: it does not address entities with a financial or strategic interest in the outcome of litigation, most notably litigation funders. Such entities create recusal concerns comparable to those posed by disclosed corporate parents or affiliates, yet their involvement may remain undisclosed. If the goal of Rule 7.1 is to meaningfully support judicial impartiality, this category of interested non-parties should be addressed.

III. Remote Testimony and Participation (Rules 26(a)(3)(A)(iii) and 45(c)(2))

a. Judicial Oversight Should Precede Issuance of Subpoenas

Consistent with Rule 43(a)'s existing framework, determinations regarding remote testimony should be made by the court **before** a subpoena issues. Litigants should not unilaterally decide that remote participation is appropriate and then seek to compel compliance.

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b. Amendments Should Be Considered Holistically

Amendments that affect remote testimony and participation cannot be evaluated in isolation. Rule 43(a) currently permits testimony by contemporaneous transmission only upon a finding of **"good cause in compelling circumstances."** Any expansion of compulsory process under Rule 45 necessarily alters the practical operation of that standard. Fed. R. Civ. P. 43(a).

Without understanding whether, and how, Rule 43(a) may be amended, it is not possible to assess responsibly the scope or consequences of proposed changes to Rule 45(c)(2).

Permitting nationwide service or compelled remote testimony would also have cascading effects across numerous related provisions, including:

- Federal Rule of Civil Procedure 32(a)(4) (use of deposition testimony when a witness is unavailable)
- Federal Rule of Evidence 804(a)(5) (unavailability due to inability to procure attendance by process or other reasonable means)
- 28 U.S.C. § 1783 (subpoenas for U.S. nationals abroad)

These provisions reflect carefully calibrated limits on compulsory testimony that should not be disturbed indirectly.

c. Constraints of the Rules Enabling Act

The Rules Enabling Act provides that procedural rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

Subpoena power directly implicates substantive rights of parties and witnesses, including due process protections and the burden imposed on non-parties. Courts have recognized that expansions of discovery or compulsory process can raise Rules Enabling Act concerns when they materially alter litigants' or witnesses' rights. See, e.g., *United States v. Berkeley Heartlab, Inc.*, Civil Action No. 9:14-230-RMG, 2017 U.S. Dist. LEXIS 192147, at *8–10 (D.S.C. Nov. 21, 2017).

Amendments to Rule 45(c) that materially expand compulsory participation—particularly for non-party witnesses—risk crossing that line.

d. The Committee Should Not Overturn *In re Kirkland*

The Committee should not, by rule amendment, overturn the Ninth Circuit's decision in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023), which held that Rule 45(c)'s geographic limits apply even when testimony is sought remotely. Id. at 1036–39.

That decision reflects a faithful reading of the text and structure of Rules 43 and 45 and recognizes their distinct purposes: Rule 43 governs **how** testimony may be presented, while Rule 45 governs **whether** a court may compel it.

Importantly, the current rules already provide a workable alternative. A party may:

1. Subpoena a witness in the witness's home jurisdiction,
2. Take the witness's deposition, and
3. Use that testimony at trial pursuant to Rule 32(a)(4).

Allowing nationwide compulsory service for trial testimony—especially remote testimony—would represent a substantial expansion of party power, impairing long-recognized protections for non-party witnesses.

Such an expansion would also invite abuse. A party could serve trial subpoenas on dozens of individuals listed as potential witnesses, forcing them to remain available throughout lengthy trials regardless of location or likelihood of being called. Where witnesses align predominantly with one side, subpoenas could be used strategically to impose burden and disruption rather than to secure probative testimony.

e. Rule 26(a)(3)(A)(iii) – Disclosure Concerns

As proposed, Rule 26(a)(3)(A)(iii) risks becoming a purely formal exercise. Parties will predictably list every potential witness and state that each "may testify in person or remotely," providing little meaningful information.

If remote testimony is contemplated, the disclosure should at least require identification of the **physical location** from which the witness would testify, as this information bears directly on subpoena authority, witness burden, and judicial oversight.

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f. Rule 45(c)(2) – Lack of Safeguards and Clarity

The proposed amendments do not adequately protect the rights of witnesses—particularly non-parties—who may be compelled to testify remotely.

The rule does not address:

- Where the court reporter must be located,
- Whether parties are entitled to be physically present with the witness,
- What court has authority over disputes arising during remote testimony.

Nor does the proposal clarify where motions to compel, quash, or enforce subpoenas must be filed. If such motions must be brought in the court where the action is pending, non-parties face substantial burdens. If brought where the witness resides, forum-shopping and gamesmanship are likely, particularly in densely populated regions with multiple potential courts.

IV. IV. Service of Subpoenas – Rule 45(b)(1)

a. Ambiguities in Proposed Methods of Service

Proposed Rule 45(b)(1)(C) permits service by delivery service "if the selected method provides confirmation of actual receipt," yet it does not require proof that the subpoena was actually received by the named individual.

In practice, commercial carriers often:

- Accept signatures from someone other than the recipient, or
- Leave parcels without obtaining any signature at all.

Similarly, Rule 45(b)(1)(A)(ii) employs multiple undefined terms—"dwelling," "usual place of abode," and "resides"—suggesting distinctions without clarifying them. The rule also permits

service on a person of "suitable age and discretion" without guidance, raising obvious questions about adequacy and fairness.

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b. Need for Guidance on Alternative Service

The Committee should provide clearer guidance regarding when courts may approve alternative methods of service. Such approval should not be based solely on expediency, particularly where ineffective service could prejudice substantive rights.

Courts should require meaningful indicia of effective service before imposing sanctions or compelling compliance based on alleged non-appearance.

V. Conclusion

The proposed amendments raise important issues affecting judicial authority, witness burden, and the balance between efficiency and fairness. Clarification, constraint, and judicial oversight—rather than expansion of compulsory power—are essential to preserving that balance.

I appreciate the opportunity to submit these comments and thank the Committee for its continued attention to these important issues.

TAB 15

No written testimony outline or comment
was submitted by the requested January 16, 2026
deadline.

TAB 16

NELSON MULLINS

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January 16, 2026

Via E-mail

Rules Committee Secretary
Rules Committee Staff | Office of the General Counsel
Administrative Office of the U.S. Courts
One Columbus Circle NE | Room 7-300
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Dear Rules Committee Secretary:

Thank you for the opportunity to testify on January 27. My testimony will address the proposed amendment to Fed. R. Civ. P. 45(d)(1)(B) concerning costs and expenses to non-parties who are expected to comply with litigation expectations of complete and thorough productions.

As requested by the Rules Committee Secretary, I provide the following outline of my remarks:

1. **Professional Background and Experience**
    - Summary of my experience defending manufacturers in complex litigation with significant document production and eDiscovery components.

2. **Frequent Use of Rule 45 Subpoenas in Complex Litigation Imitates eDiscovery Served on Manufacturer Defendants**
    - Common reliance on Rule 45 subpoenas to obtain documents from third-party vendors, distributors, dealers, and sales representatives.
        - Examples of ESI searches demanded of third parties.
        - How they mirror and repeat eDiscovery to litigation defendants.

3. **Observations on Third Parties Attempting Compliance Without Counsel**
    - Real-world individuals attempt to avoid attorney fees associated with Rule 45 subpoenas.

- Practical challenges faced by subpoena recipients navigating eDiscovery obligations without legal representation.

4. **Judicial Involvement: Infrequent but Impactful**
   - Limited practical access for third parties to seek court relief.
   - Instances where courts have quashed oppressive or overly burdensome subpoenas based on cost and burden.
     - Example: Informal hearing regarding a Rule 45 subpoena to a medical device sales representative/distributor before the Hon. Craig Shaffer, U.S. Magistrate Judge, District of Colorado.

5. **Importance of Clear Rule Language to Non-Litigants**
   - How including cost-shifting language in the amended rule—repeated in the Rule 45 subpoena form—would inform real-world recipients of their rights and available mechanisms to avoid or mitigate the litigation costs of eDiscovery.
   - Through this amendment, the legal industry can help individuals outside litigation minimize expenses, ensure compliance and further the goals of proportionality.

Very truly yours,

Mary T. Novacheck

MTN

TAB 17

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January 13, 2026

VIA EMAIL ONLY

Advisory Committee on Civil Rules
RulesCommittee_Secretary@ao.uscourts.gov

RE: Written Submission in Advance of Testimony on Proposed Amendments to Rule 45

Dear Rules Committee:

Thank you for the opportunity to submit these comments in advance of my testimony on January 27, 2026. This statement integrates two prior public comments addressing Rule 45 that I find to be instructive on this issue, and which reflect my thoughts and comments on the currently proposed amendments to Rule 45. These comments are from Lawyers for Civil Justice and Tom Allman, Chair Emeritus, Sedona Conference WG 1.

My comment, and my testimony, urge the Committee to: (a) refrain from loosening service requirements or delaying tender of witness fees; (b) clarify and strengthen non-party protections against compliance costs by modernizing the Rule to require reimbursement of reasonable costs absent good cause; and (c) provide clear guidance addressing privilege logging burdens borne by non-parties. All of which can be significant if not efficiently controlled and tied to legitimate discovery needs.

I. Service of Subpoenas and Tender of Witness Fees

The Committee's record simply does not demonstrate a pervasive problem with ineffective service warranting expansion to untested methods or erosion of existing safeguards. The proposed service expansion presents heightened risks of increased uncertainty, ex parte approvals of speculative methods, and ensuing litigation over sufficiency, despite the Committee's own observation that service "usually does not present problems."

Further, the proposal to delay tender of witness fees should be withdrawn. Delaying witness fee tender would reduce compliance, shift upfront costs to non-parties, and undermine Rule 45's long-standing purpose of protecting subpoenaed witnesses, individuals, or entities, particularly where document subpoenas do not culminate in an appearance or where trials settle before testimony is required.

Retaining contemporaneous tender of fees by the subpoenaing or requesting party ensures a precise and predictable rule — either the issuer pays or the subpoena is procedurally invalid — and avoids forcing witnesses to gamble on later reimbursement.

II. Require Reimbursement of Reasonable Expenses, Absent Good Cause

The Committee should also modernize Rule 45(d)(2)(B)(ii) to require reimbursement of reasonable compliance costs to non-parties, absent good cause. The information age multiplied the burdens of document and ESI production, and the current framework often forces non-parties to bear substantial expenses or engage in costly motion practice, contrary to the Rule's protective intent. Because there is no specific language within the Rule that defines what costs and fees should be paid or reimbursed, different courts determine what are, or are not, reimbursable costs and fees based on different criteria that are not tethered to the Rule itself. An amendment providing reimbursement for "any reasonable expenses … absent good cause," coupled with Committee Note guidance that financial size is not good cause to reduce fees and costs would restore the Rule's original purpose and continue to reduce satellite litigation through non-party subpoenas.

III. Provide for Proportional Privilege Logging for Non-Parties

Non-parties often face outsized privilege logging burdens that the current Rule neither addresses nor mitigates. Despite there being precedent within the Rules generally to allow for categorical logging, some courts simply default to document-by-document logs under Rule 45(e)(2)(A), imposing significant, unreimbursed expense on non-parties who typically do not participate in Rule 16/26 planning where these issues are, or should be addressed, by parties. Thus, Rule 45 should confirm that categorical logs and alternative methods may satisfy the Rule; that certain categories (e.g., post-complaint attorney communications) generally need not be logged absent compelling circumstances; and that logging expenses are compensable as compliance costs.

In conclusion, Rule 45's core promise is to protect non-parties from undue burden and expense attendant to involuntary assistance to the court. The Committee should avoid amendments that weaken witness protections on service and fee tender. It should instead adopt focused reforms that (1) require reimbursement of reasonable costs absent good cause, and (2) privilege-logging guidance tailored to modern discovery. These targeted changes would realign incentives, help reduce satellite litigation, and equitably allocate costs to the parties who choose the litigation and benefit from the discovery. They would also reaffirm that non-party status merits heightened protection, consistent with the Rule's text and history.

Very truly yours,

HUIE, FERNAMBUCQ & STEWART, LLP

John Isaac Southerland

By: John Isaac Southerland

TAB 18

January 13, 2026

RULES COMMITTEE STAFF
Rules Committee Staff | Office of the General Counsel
Administrative Office of the U.S. Courts
(202) 502-1820 | www.uscourts.gov
One Columbus Circle NE | Room 7-300 | Washington, DC 20544

Re: proposed amendments to Rule 45, (b) and (c)

I am a California attorney and the founder of Varlack Legal Services, where my practice focuses on civil litigation, employment law, and consumer protection. I advocate for individuals and small businesses, with a particular emphasis on accountability, equity, and access to justice.

Remote Testimony and Service of Subpoenas

I support the proposed amendments to Rule 45, to address remote testimony under Rule 45(c) and service of subpoenas under Rule 45(b). Collectively, these changes improve the rule to mirror how federal litigation is practiced nowadays, while preserving the rule's core purpose of protecting witnesses from undue burden while ensuring effective notice.

Remote Testimony — Rule 45(c)

As a California attorney, I agree that the Committee is correct to amend Rule 45(c) to address and correct the consequences of the In re Kirkland decision. My practice focuses on civil litigation and trial work, and I regularly encounter subpoena and service issues in real-world settings where the existing rule, as interpreted in Kirkland, creates unnecessary barriers inconsistent with effective and fair litigation practice.

I maintain a statewide practice, and witnesses—especially nonparties—often move during the life of a case. Tying subpoena compliance to the physical courthouse or issuing court results in a framework that can rob the litigants of the ability to present cost-effective testimony where our electronic capabilities allow for reliable trustworthy remote appearances, especially important in a large state like California where travel from rural areas to urban ones can be challenging and extreme weather events have also become fairly common.

Travel challenges arise where the witness doesn't have child care, money for public transportation or is incarcerated. These seem like extremes but I have faced all of these scenarios in the course of litigation.

The Standing Committee's preferred language appropriately focuses Rule 45(c) on what it is designed to regulate: the burden placed on the witness, not the location of the courtroom. A witness who appears remotely complies from where they are physically located, and it is that location that determines distance, expense, and burden.

However, it is important to ensure that the court's understand where the witness is located. The proposed amendment says:

"(2) For Remote Testimony. Under Rule 45(c)(1), the place of attendance for remote testimony is the location where the person is commanded to appear in person"

It may be useful to clarify that the location is where the person is commanded to "provide the remote testimony" to ensure that there is no continued confusion over the witness' location.

This clarification also resolves the confusion highlighted in recent cases by distinguishing:

- the geographic protections of Rule 45(c), which remain fully intact, from
- the separate question of where testimony is deemed to occur for purposes of Rules 43 and 77(b).

The proposed language eliminates unnecessary litigation over a legal fiction and ensures predictable, nationwide application of Rule 45 without expanding judicial power or diminishing witness protections.

Service of Subpoenas — Rule 45(b)

I also strongly support the amendments to Rule 45(b)(1) clarifying permissible methods of service.

In practice, I frequently serve witnesses at their place of employment, including buildings with restricted access such as hospitals, corporate offices, warehouses, and secure facilities. In many of these settings, a security guard, receptionist, or gate agent is the only person available to receive documents. Requiring personal, face-to-face delivery to the named individual in these circumstances imposes unnecessary barriers that do not advance notice or fairness.

The Advisory Committee should consider whether the proposed text really facilitates service in a business context. In particular, 45(b)(1)(A)(i) says that, "Serving a subpoena requires delivering a copy to the named person personally." This is not a requirement currently. I'm very concerned about facilitating service on both 30(b)(6) witnesses as well as named witnesses in a business dispute. (Check this for accuracy of your practice).

The Advisory Committee should either eliminate the word “personally” or add an additional prong to reflect the reality of service in the workplace.

The clarification that service may be made by delivering a subpoena to an agent authorized by appointment or by law reflects workplace reality and prevents evasion of service through access restrictions. Security and gate personnel routinely function as responsible intermediaries for deliveries, including legal documents, and employees rely on them for receipt of time-sensitive materials.

The amendments appropriately shift the focus away from formalism and back to the rule’s core objective: whether the method of service is reasonably calculated to give notice. By aligning Rule 45 with familiar service methods under Rule 4 and authorizing reliable mail, commercial delivery, and court-approved alternative means, the rule becomes clearer, more efficient, and less susceptible to gamesmanship.

For practitioners with statewide or national practices, these clarifications are essential. I urge the Committee to adopt the proposed amendments.

Sincerely,

Tiega-Noel Varlack

TAB 19

AMERICAN ASSOCIATION FOR JUSTICE®
The Association for Trial Lawyers

Statement of Navan Ward Jr.

Past President, American Association for Justice
Partner, Beasley Allen

Before the Advisory Committee on Civil Rules
January 27, 2026

Thank you for providing an opportunity to comment on the proposed amendments to Rule 45(b)—Service of a Subpoena. My name is Navan Ward, and I am a past president of the American Association for Justice (AAJ) and a partner at the Beasley Allen Law Firm. I am a founding member of Shades of Mass, a plaintiff-side legal organization working to increase diversity in MDL leadership and a products liability lawyer. Regardless of practice area, AAJ members regularly require service of subpoenas for witnesses to appear at trials, hearings, and depositions. AAJ supports the proposed amendments and suggests some modest changes to improve the rule, supporting the goals of the committee to provide effective, efficient service. In addition to my testimony today, AAJ will file a public comment on Rule 45(b), and Tobi Millrood, the AAJ past president who served immediately before my term, will address amendments to Rule 45(c) and 41(a), which AAJ also supports.

I. AAJ Supports Additional Options for Serving a Subpoena

When AAJ members learned that the Advisory Committee on Civil Rules (Advisory Committee) was in the early stages of considering an amendment on subpoena delivery, there was no shortage of stories shared regarding difficulties with parties who evade service. Many of these individuals are extremely wealthy and use their resources to "hide" behind gated walls, often protected by security. They are rarely seen in public, making typical service by a process server very challenging.

The additional options provided by the proposed amendment, including "using another means that is authorized by the court for good cause and is reasonably calculated to give notice," provide much needed flexibility, especially when it comes to serving subpoenas on wealthy tech moguls who rely on their technology platforms to communicate. And while the Committee Note indicates this option would not usually be the first choice used for service, it still is a useful addition to Rule 45(b) when regular service methods—most often effectuated by a process server—fail.

The public comments indicate opposition from process servers regarding these additional methods. These concerns are misplaced. First, the current rule does not require the use of process servers, but firms regularly do so because the business model makes sense—it is fast, efficient,

and affordable.[1] The model will continue to make sense if the proposed amendments are adopted. Repeated service attempts cost both time and money and are especially detrimental to plaintiff-side practice working on a contingent basis. Second, many courts are already using one or more of these proposed changes so the proposed amendment is somewhat catching up to existing practice. For example, on January 1, 2026, a new California law (Cal. Civ Pro 413.30) permitting service by email or electronic media went into effect.

II. AAJ Supports Additional Methods for Tendering Fees

AAJ supports the proposed revisions to Rule 45(b)(1)(B), which provide an alternative for tendering witness fees at the time and place that the witness is to appear, rather than only at the time of service. The current solitary option for tendering fees is impractical given the modern methods of subpoena delivery, especially since it is not possible for the postal service or commercial carriers to tender fees as part of their delivery services and doing so would likely lead to confusion or unnecessary disagreement over whether the fees had been delivered. In an age of electronic payment (and corresponding electronic recording keeping of such payments), it makes significantly more sense to provide a more flexible option that ensures that the witness receives the fee. AAJ does recommend moving the phrase "unless the court orders otherwise" to the end of the sentence (or to the beginning of the sentence) for ease of understanding.

III. Recommended Textual Edits

AAJ has two primary concerns with the proposed amended text. First, subsection (b)(1)(A)(i) is drafted in a confusing manner. What exactly does it mean to serve a "named person personally" when serving a 30(b)(6) witness? The specific person is for the corporation to identify so the proposed wording seems inadequate to accomplish that. The style consultant's interpretation that subsection (b)(1)(A)(i) carries through to the remaining subsections is not supported by the statutory construction, which direct that the use of the conjunction "or," signals to the reader that each subsection operates independently, on its own, as a separate option with its own plain meaning.[2]

One way to solve this problem is to add another subsection to the list providing for service by an authorized agent, similar to language in Rule 4(e)(2)(C).

> delivering a copy to an agent authorized by appointment or by law to receive service of process

[1] Almost every law firm has a regular process server(s) or company that it contracts with to provide service of subpoenas and other legal notices as needs arise.

[2] During the June 2025 Standing Committee meeting, "A judge member asked why 'named person' is not needed in the other romanettes. Professor Garner [style consultant] responded that romanette (i) identifies the target as 'the named person' and the subsequent romanettes inherit that meaning (such that repeating 'named person' is unnecessary). The judge member asked if a reader would understand that the modifier carries through to the other romanettes just as it would if the modifier were in the introduction. Professor Garner said the Committee had employed this usage frequently."

This language would also alleviate the potential problem of misinterpretation resulting from importing some of the rule, but not all of it.

Second, AAJ wants to ensure that the additional options in the proposed rule address the issues of persons who evade service. One recommendation is to provide that a subpoena can be left with a person of suitable age and discretion even if that person does not reside at that particular dwelling. Common examples include property managers, nannies, and housekeepers. While the people employed in these occupations often live on their employers' properties, some do not. Indeed, some may live close by, in an adjacent structure or smaller building, or commute to the subpoenaed person's residence according to their work schedule. Regardless, these employees would be expected, in the course of their duties, to answer the door and accept deliveries. The key provision is that the subpoena be left with a person *of suitable age and discretion*.

Another recommendation to address the issue of evasion of service is to ensure that the commercial delivery option works as intended. Requiring the commercial carrier to confirm "actual receipt" is confusing. Does that mean that the named party must sign for the delivery for service to be complete? If so, service could be incomplete simply because a subpoenaed person's spouse or partner answered the door and accepted the delivery, or if the subpoena is delivered to a business witness at a commercial address and delivery is accepted by a receptionist or office manager. The words "actual receipt" may imply that physical receipt by the commercial carrier is required, which is likely not the literal case in an age of electronic signature. Substituting "delivery" for "actual receipt" addresses these issues, especially since a commercial carrier can easily document the date and time when subpoena delivery occurred as well as maintain a record of who accepted the delivery.

IV. Recommended Change to the Committee Note

Finally, AAJ recommends adding some additional language to the Committee Note regarding the additional method of service. Specifically, AAJ recommends adding a sentence about flexibility and technology as a prompt to courts that the rule contemplates electronic service for individuals with a known social media presence who may be able to evade service:

> The amended rule also authorizes a court order permitting an additional method of serving a subpoena so long as that method is reasonably calculated to give notice. A party seeking such an order must establish good cause, such as evasion of service, which ordinarily would require at least first resort to the authorized methods of service. The rule is intended to be flexible and accommodate electronic means of service and new technologies. The application should also demonstrate that the proposed method is reasonably calculated to give notice.

V. Conclusion

AAJ supports the proposed Rule 45(b) amendments on subpoena delivery and believes that some further refinements would ensure that the amendments are easy to understand and implement by both parties and the courts. These amendments should save time and resources for parties serving hard to locate persons, especially the uber-wealthy who have the resources to evade service. The proposed amendments would not disrupt the process server business model as that would still be a preferred method for regular service. Please let me know if I can answer any questions.