

TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
MEETING OF THE ADVISORY)
COMMITTEE ON CIVIL RULES RE:)
PROPOSED AMENDMENTS TO THE)
FEDERAL RULES OF CIVIL)
PROCEDURE)
)

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ADMINISTRATIVE OFFICE OF THE U.S. COURTS

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PROCEDURE)
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Suite 305
Heritage Reporting Corporation
1150 Connecticut Avenue, N.W.
Washington, D.C.

Tuesday,
January 27, 2026

The parties met remotely, pursuant to the notice,
at 10:00 a.m.

PARTICIPANTS: (Via Microsoft Teams)

- HONORABLE SARAH VANCE, Chair
- THOMAS ALLMAN
- LAUREN BARNES
- PROF. ANDREW BRADT
- ALEX DAHL
- XIOMARA DAMOUR
- HONORABLE JAMES C. DEVER, III
- RACHEL DOWNEY
- PROF. BRIAN FITZPATRICK
- STEVEN FLEISCHMAN
- SCOTT HENDLER
- MELISSA KOTULSKI
- HONORABLE HANNAH LAUCK
- ROBERT LEVY
- PROF. RICK MARCUS
- TOBI MILLROOD
- MATTHEW MOELLER
- MARY NOVACHECK
- JONATHAN REDGRAVE
- JOHN SOUTHERLAND
- TIEGA VARLACK
- NAVAN WARD
- DAVID WRIGHT

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P R O C E E D I N G S

(10:00 a.m.)

1
2
3 CHAIR VANCE: All right. Good morning,
4 everyone, and welcome and thank you to all Committee
5 members, witnesses, and observers who are joining us
6 on Teams for this public hearing on the proposed
7 amendments to the Federal Rules of Civil Procedure. I
8 hope everyone is appearing from someplace warm and
9 safe in light of the weather events we've had this
10 week.

11 The proposals published for public comment
12 are amendments to Rules 7.1, 26, 41, 45, and 81. At
13 today's hearing, we'll be hearing from 17 witnesses.
14 We look forward to hearing the testimony from all of
15 them. We also appreciate everyone who has submitted
16 comments and those who plan to do so before the end of
17 the comment period on February 16. All of this input
18 is crucial to the rulemaking process.

19 At today's hearing, each witness will have
20 five minutes. We ask that you keep your remarks to
21 five minutes to allow Committee members ample time to
22 ask questions within the 10-minute time period. All
23 comments should be concluded within the 10 minutes so
24 we can move on to the next witness. Sarah Sraders,
25 who is counsel to the Civil Rules Committee, and I

1 will be keeping time.

2 Mary D'Agostino, who was scheduled to
3 testify at 11:20 Eastern, has dropped out, so the
4 times on the schedule will be adjusted as needed. At
5 the outset, please note that the purpose of today's
6 hearing is to consider the specific amendment
7 proposals that the Standing Committee has approved for
8 publication and comment. In light of our time
9 constraints, please keep that in mind in giving your
10 testimony as your views on these specific proposals
11 are essential to our considered continued deliberation
12 on them.

13 Now we have a few technical reminders.
14 Witnesses, please leave your video off and microphones
15 muted until you're called upon to make your formal
16 presentation. Committee members are welcome to have
17 their videos on throughout the hearing, but please
18 mute the audio when you're not speaking. We ask that
19 you use the Raise Hand function or physically raise
20 your hand in the video frame when you wish to comment
21 or ask questions. This hearing is being recorded and
22 a transcript will be made available publicly on the
23 U.S. Courts' website. If you get disconnected, use
24 the original Teams link to rejoin or use the
25 conference bridge number located at the bottom of the

1 meeting invitation to join by phone.

2 With that, we will proceed to our first
3 witness, Scott Hendler. Mr. Hendler, welcome, and
4 please proceed with your testimony.

5 MR. HENDLER: Thank you. I trust you can
6 hear me okay?

7 CHAIR VANCE: I can.

8 MR. HENDLER: Okay. I am here to testify in
9 support of the proposed amendment to Rule 41(a). I
10 support the amendment which aims to clarify and
11 modernize the voluntary dismissal procedures in multi-
12 claim and multi-party cases, and I support this
13 amendment because it improves efficiency for courts
14 and litigants by allowing targeted dismissal of
15 claims. The need for the amendment is necessary
16 because some courts around the country allow dismissal
17 of individual claims or parties, while others require
18 dismissal of the entire action due to a literal
19 reading of the rule.

20 The increased complexity of modern
21 litigation, more parties, more claims, longer factual
22 development, make this kind of flexibility essential
23 to litigants, particularly in complex multi-party
24 cases. Practical challenges the plaintiffs face when
25 evidence becomes available only after significant

1 delay requires ability to dismiss individual claims or
2 parties. For example, in a multi-party civil rights
3 case, which is quite timely right now, multiple
4 officers may have been involved in the alleged
5 misconduct, and only after the collection of body
6 camera video and other evidence may it become evident
7 that some are responsible and others are not, but
8 because of statute of limitations considerations and
9 the development of evidence, it's necessary to name
10 everyone that appears to have been involved and
11 responsible.

12 So another example is in, say, a death in
13 custody, where particular jailers may be responsible
14 for a death, but that death or the condition that led
15 to the death may have been exacerbated by subsequent
16 conduct either by first responders or the lack of care
17 and so forth.

18 Another example is in multi-plaintiff and
19 multi-party toxic tort litigation or mass tort
20 litigation. For example, I have a case pending in the
21 Federal District of Delaware on behalf of 200
22 different plaintiffs against six different
23 international corporations. Some of those plaintiffs
24 have claims against some of the defendants, but some
25 have claims against all the defendants. That doesn't

1 become evident until the evidence can develop, and
2 once it develops, it's imperative to be able to narrow
3 the litigation and focus the issues by voluntarily
4 dismissing not just an individual claim or multiple
5 claims but an individual party, and to that end, I
6 make this one recommendation that the amendment
7 include in its language that an individual party can
8 be dismissed from a suit.

9 Right now, it says a party, a claim, or
10 multiple claims, I believe, and I would add that one
11 small clarification so that where a party is
12 dismissed, it does not result in the dismissal of the
13 entire action. The reason the dismissal of the entire
14 action poses such a problem is, first, you have
15 statute of limitations considerations, but, secondly,
16 even if you don't, the only way to avoid that -- well,
17 if you do have a statute of limitations issue, you
18 have to move to amend your complaint, and that is a
19 laborious exercise. It also invokes additional
20 motions practice. It consumes additional resources
21 from the court and the litigants. And for that
22 reason, it's necessary to adopt this change, and, as I
23 said, I think it would be important to include or
24 clarify that an individual party may be dismissed.

25 Let's see. The amendment further maintains

1 the existing safeguards that exist under Rules 23,
2 23.1, 23.2, and 66. I started my timer a little late,
3 so please let me know when I approach five minutes and
4 I'll wrap it up.

5 CHAIR VANCE: You're at five minutes.

6 MR. HENDLER: Okay. Well, I think I've made
7 the point, and I'm happy to take questions from the
8 Committee.

9 CHAIR VANCE: All right. Do Committee
10 members have any questions for Mr. Hendler?

11 (No response.)

12 CHAIR VANCE: Reporters? Rick Marcus.

13 PROF. MARCUS: Mr. Hendler, can you hear me?

14 MR. HENDLER: I can. Thank you. Hi. Good
15 morning.

16 PROF. MARCUS: Hi. I'm wondering if you
17 could elaborate a little bit on why you think
18 currently there's some ambiguity about whether one
19 could dismiss as to a party. I think that was the
20 goal, and I'm not clear why you think it wasn't
21 accomplished.

22 MR. HENDLER: Well, as I read the proposed
23 amendment, it says you may dismiss the case, the
24 claim, a claim, or multiple claims, but I didn't see
25 language that focused on an individual party unless

1 perhaps I misread it. Does the proposed amendment
2 specify an individual party? Because I didn't
3 understand it that way.

4 PROF. MARCUS: Well, it does say one or more
5 of its claims, and I would assume dismissing all of
6 the claims against one party is within that. Does
7 that seem correct to you?

8 MR. HENDLER: Well, no, and I'll tell you
9 why because, if you have multiple parties, let's say
10 in a toxic tort litigation case, you may assert a
11 claim of aiding and abetting or participation and
12 assistance, and if you dismiss that claim -- if your
13 intent is to dismiss the claim as to one party that
14 may have engaged in that, you don't want to dismiss
15 that claim as to all parties, and so I think just
16 adding that, you know, couple of words to just clarify
17 that an individual party can be dismissed would make
18 the amendment clearer.

19 For example, a motion would say, you know,
20 plaintiffs move to dismiss defendant X or plaintiffs
21 moved to dismiss all claims as to defendant X. You
22 wouldn't want all those claims to be dismissed as to
23 any other party even though you're attempting to
24 specify it relates to a single party because, if
25 that's not in the rule, I think that the courts,

1 different courts could give it a different
2 interpretation, and just out of an abundance of
3 caution, I think that might be a valid clarification.

4 PROF. MARCUS: Thank you.

5 MR. HENDLER: Did I address your question,
6 sir?

7 PROF. MARCUS: I think so, but Andrew Bradt
8 has his hand up.

9 MR. HENDLER: Okay.

10 CHAIR VANCE: Andrew?

11 PROF. BRADT: I guess I just want to follow
12 up on that very quickly. Are you aware of any way to
13 dismiss a party from a litigation without dismissing
14 the claims against that party? It seems to me, I just
15 wonder, is there any other mechanism in the rules
16 where a party would dismiss another party absent from
17 the route of dismissing all of the claims against that
18 party?

19 MR. HENDLER: No, no. I think that's
20 correct. You could not do that. If you dismiss the
21 party, you dismiss all the claims against that party.
22 But what I'm suggesting is that if you dismiss all the
23 claims and those claims apply to multiple parties, you
24 don't want the risk of that dismissal of those claims
25 to somehow dismiss them against other parties you

1 don't intend to dismiss. Do you follow what I'm
2 saying, or am I confusing you? I'm sorry.

3 PROF. BRADT: No, I think I follow. I think
4 I follow what you're saying.

5 MR. HENDLER: You know, given the way the
6 courts, different courts, have interpreted this rule
7 and the reason for the amendment in the first place, I
8 think, suggests that, you know, courts may lend their
9 own interpretation to this, and I just think out of an
10 abundance of caution and for, you know, the lack of
11 doubt about any aspect of it, it would make sense to
12 just add you may dismiss an individual party.

13 You know, the other way around this is you
14 may want to dismiss all the claims against all the
15 parties, so you may want to dismiss this claim of
16 aiding and abetting because the evidence developed
17 that it doesn't support such a claim and you want to
18 just dismiss that claim as to all parties, but in
19 another circumstance, you may want to dismiss that
20 claim only as to one party but fewer than all the
21 parties.

22 CHAIR VANCE: I think we have your comments,
23 Mr. Hendler. Thank you.

24 Are there any other questions for Mr.
25 Hendler?

1 (No response.)

2 CHAIR VANCE: All right. Let's move on to
3 the next witness, who is Tobi Millrood.

4 MR. HENDLER: All right. Thank you. Have a
5 good day.

6 CHAIR VANCE: Thank you. You too. Thank
7 you for your testimony. It was very helpful.

8 MR. MILLROOD: Thank you, Judge Vance.

9 CHAIR VANCE: All right, Mr. Millrood. All
10 right. Welcome, Mr. Millrood, and you have the floor.

11 MR. MILLROOD: Thank you, Judge Vance.
12 Thank you members of the Committee. Good morning. My
13 name is Tobi Millrood. I'm a partner at the law firm
14 of Kline & Specter in Philadelphia, Pennsylvania,
15 where I serve as chair of the mass tort department.
16 I've practiced law for 30 years and have served in
17 many, many leadership positions, including as lead
18 counsel of multiple mass tort litigations. In
19 addition, I'm a trial lawyer and have vast experience
20 in the trial of civil cases in complex injury and mass
21 tort cases.

22 This morning, I'm presenting on behalf of
23 the American Association for Justice. I served as
24 AAJ's president from 2020 to 2021, during which time
25 the civil bar learned to make significant and

1 successful adjustments to the need for remote
2 practice. My comments this morning are specific to
3 AAJ's support of the proposed amendments to Rule 45(c)
4 in furtherance of my written submission. AAJ also
5 supports the proposed amendments to Rule 41(a), and I
6 will allow my written submission there to speak for
7 itself.

8 The importance of presenting live testimony
9 in court cannot be forgotten. The very ceremony of
10 trial and the presence of the fact finder may exert a
11 powerful force for truth telling. The opportunity to
12 judge the demeanor of a witness face to face is
13 accorded great value in our tradition. These were the
14 comments of this Committee 30 years ago to Rule 43,
15 allowing for contemporaneous transmission of
16 testimony. With the modest amendment to Rule 45, this
17 Committee can accomplish the important goals of not
18 only meeting the purpose of witness convenience but
19 the crucial consequence that will result with
20 efficient trials where the jury can consider the best
21 testimony evidence.

22 To be clear, the purpose of the rule on
23 witness attendance is for witness convenience to
24 protect against the undue burden of traveling, and we
25 should not lose sight of that. The rule is not

1 written for the court's convenience. The rule is not
2 written for a party's strategic advantage. The rule
3 is written for witness convenience. Despite the many
4 challenges that plagued our society through the COVID
5 pandemic, we gained a significant silver lining in the
6 litigation arena. We learned that the promotion of
7 fast and fair efficiency of litigation and trials can
8 still be harnessed through modern technology. Remote
9 proceedings and testimony became the rule by necessity
10 rather than exception. We learned we can do "hard
11 things" without much inconvenience at all.

12 The changes to Rule 45(c) acknowledge the
13 longstanding rule and practice within our courts.
14 Substantively, testimony occurs where the trial is.
15 Procedurally, compliance occurs at the place of the
16 witness's location. This is not some massive sea
17 change in litigation. It strikes me as odd that the
18 opponents of the rule want to embrace remote testimony
19 for depositions but not for trial. Such a distinction
20 reveals that the real opposition relates to strategic
21 advantage and not to the purpose of the rule.

22 Logistically, the modest rule change will
23 have so many advantages. First off, it provides
24 enormous efficiency for the courts. It will
25 significantly reduce the taxing and burdensome

1 experience of endless deposition designations. It
2 will allow the court to neatly manage the conduct of
3 trial and the sequence and order of proof.

4 Second, it serves the most salutary goal of
5 providing jury engagement with real-time credibility
6 assessment, as opposed to the droll, sleep-inducing
7 experience of watching hours of video deposition
8 footage.

9 Third, it prevents the constant skirmishes
10 that ensue when parties fight over the need for
11 updated video depositions to resolve stale testimony
12 taken earlier in lengthy litigation.

13 Fourth, it deconstructs the unfortunate
14 gamesmanship that can occur with shielding important
15 witnesses that have crucial testimony for the jury's
16 consideration merely because of geographic boundaries.
17 We have already learned from experience that all of
18 this is technologically feasible. Litigants at trial
19 these days are accustomed to modern trial technology.

20 What's more, remote testimony will not
21 eliminate the court's ability to manage their
22 courtrooms. The same way a live in-person witness can
23 be instructed not to communicate with counsel while on
24 the stand, the remote witness can be given appropriate
25 instructions. There are easy safeguards to ensure the

1 integrity of the trial. The Federal Rules provide for
2 a national system of justice. The amendments to Rule
3 45(c) will restore clarity to nationwide subpoena
4 authority, ensuring that our federal courts remain
5 accessible to witnesses, litigants, and jurors. I
6 welcome the Committee's questions relating to these
7 issues, and I thank you for the time this morning and
8 in consideration of the rule changes.

9 CHAIR VANCE: Thank you, Mr. Millrood.

10 Are there questions from Committee members
11 for Mr. Millrood?

12 MR. MILLROOD: I see Professor Marcus.

13 CHAIR VANCE: Yes, Rick, you have a
14 question?

15 PROF. MARCUS: Well, I thank you very much.
16 Mr. Millrood. We've benefitted from your insights in
17 the past. Thank you today. I have a couple of
18 questions. One is why you think over on page 3 of
19 your submission you would add some words to the
20 Committee note. And also, I wonder if you could say
21 some more about adequate safeguards just from your
22 experience.

23 And though that is not about Rule 45(c),
24 since we also have a Rule 45(b) amendment on service
25 of subpoenas, I wonder if you could tell me whether

1 you think I'm wrong to think parties serving subpoenas
2 really want the witness to get notice and to show up,
3 and so offering different ways of serving might be to
4 the benefit of the party seeking to subpoena that
5 witness. But, basically, since you're here to talk
6 about 45(c), I'm interested in what you have to say
7 about why you think more words are needed in the
8 Committee note and what your experience with adequate
9 safeguards has been.

10 MR. MILLROOD: I think -- thank you,
11 Professor Marcus, and it's good to see you, as always.
12 I'm sorry that we're -- well, I guess this was always
13 scheduled remotely, but it's always nice to see you in
14 person as well. It's good to see you again.

15 PROF. MARCUS: Do you really think we wish
16 we'd been traveling yesterday?

17 MR. MILLROOD: No. I was just suggesting
18 that maybe we could have adopted Judge Vance's
19 suggestion we all meet somewhere where it's warm and
20 nice and do this hearing somewhere where we can not be
21 snowbound.

22 But anyway, on the Committee note, there is
23 just a minor suggestion that we had recommended in my
24 testimony that was the written testimony. There is
25 still this -- ever since, really, the Kirkland case,

1 there's still this open question about where the
2 testimony occurs, what is the place, and so this
3 modest change where we said, for purposes of Rule 43
4 and Rule 77(b), such remote testimony should be
5 considered as occurring in the court where the trial
6 or hearing is conducted. As I just mentioned in my
7 comments, there's a distinction here between what's
8 substantive and what's procedural. Substantive, the
9 testimony, occurs in the courtroom. That is where the
10 testimony is occurring. Procedurally, compliance with
11 the rule is where the witness is attending, that is,
12 wherever they're sitting taking the testimony.

13 As it relates to safeguards, you know, we
14 have been, as I mentioned in my testimony, ever since,
15 really -- I mean, there were remote depositions, to be
16 sure, before COVID, but they've exploded since COVID,
17 and a constant concern, whether it's deposition or
18 trial testimony, is who's in the room and is someone
19 coaching the witness. Those same kinds of
20 considerations or concerns occur when we're live in
21 trial and the court takes a break and the witness, you
22 know, goes to take a comfort break or whatever else
23 and the parties are concerned, oh, is the witness
24 going to be coached.

25 And just like live testimony, the court

1 controls the management of the trial and can instruct
2 the parties and the witness under penalties and
3 sanction to make sure that when the witness is
4 presenting testimony contemporaneously remotely that
5 they are not to be coached, that they are not to
6 consult with anyone else. They're not to consult with
7 anything other than would be ordinarily permitted at
8 trial. If the witness was permitted to look at their
9 notes or their report or their evidence or their
10 learned treatises, the same would be remotely, but the
11 witness wouldn't have availability for anything else
12 as instructed by the court. That's a simple
13 safeguard.

14 CHAIR VANCE: I have a question, Mr.
15 Millrood. We received comments expressing concerns
16 about parties issuing subpoenas for remote testimony
17 without first getting approval under Rule 43(a). To
18 your knowledge, does that happen, and do parties just
19 issue subpoenas for remote testimony without getting a
20 court order under 43(a) first?

21 MR. MILLROOD: That's not my experience that
22 that happens very often. I think they always go to
23 the court and say, Judge, we'd like your permission.
24 We'd like to have the witness contemporaneously
25 testify remotely, and so we're going to be issuing

1 this subpoena from this court under Rule 43. And, you
2 know, there have been some judges that have permitted
3 it. I know that in MDL litigation, Judge Fallon used
4 to favor use of contemporaneous transmission. I know
5 Judge Billy Roy Wilson used to favor it in the Eastern
6 District of Arkansas. So there have been judges in
7 these large, complex litigations that favor it, but
8 always the permission was sought first.

9 CHAIR VANCE: Right. Thank you very much
10 for your comments. They've been very, very helpful.

11 Let's move on to the next witness, Mr.
12 Thomas Allman. Mr. Allman, welcome, and you may
13 proceed with your testimony.

14 MR. ALLMAN: Thank you, Your Honor. First,
15 let me just comment quickly on proposed Rule 7.1. I
16 really found persuasive the reasons why you're making
17 these changes, and I thought they were excellent. I
18 would just like to acknowledge that at least in some
19 respects, you're passing up an opportunity to deal
20 with the third-party litigation funding disclosures
21 right here in the rule as, for example, New Jersey has
22 done by local rule, but I have to confess that upon
23 reading up on it a little bit, I tend to favor the
24 recommendation that the Delaware Supreme Court made to
25 the -- the recommendation that was made to the

1 Delaware Supreme Court that a rule analogous to the
2 one dealing with insurance agreements probably is the
3 best place to put the references to disclosure of
4 third-party funding.

5 So that completes my comment on Rule 7.1,
6 and, if you don't mind, I'd like to move to my
7 favorite rule, Rule 45. I was general counsel of a
8 large company at the time that that rule went into
9 effect, the 1991 amendments went into effect, and what
10 we particularly liked was it suddenly recognized the
11 importance of non-parties having treatment that was
12 tailored to their situation.

13 So, with respect to your service of summons
14 amendment to Rule 45(b)(1), I don't have any means of
15 giving any updated comments about how well that works,
16 but I do suggest, as I will in my final comments, that
17 there is some attention that needs to be paid to the
18 treatment of non-parties under Rule 45.

19 So let me now turn to the place of
20 compliance. I found the testimony just given to be
21 very interesting because, if I understand what they're
22 saying, is that they do support a rule that wouldn't
23 require prior approval before any attempt is made to
24 serve a subpoena on a non-party testifying witness,
25 and I noticed there was no comment about the other

1 suggestion which I think is worth taking into account,
2 and that is that the non-party witness should also be
3 served with a copy of that order permitting remote
4 testimony before that takes place.

5 I have absolutely no problem at all with
6 clarifying that Rule 45(c) permits the issuance of
7 subpoena for remote trial testimony at a designated
8 location if the witness needs to travel no more than a
9 hundred miles to reach it. I mean, that makes sense
10 to me. But what I'm really concerned about, frankly,
11 is that if I understand what your Rule 43, 45
12 subcommittee is considering, you are considering the
13 possibility of limiting Rule 43, the protection that
14 only under compelling circumstances should that be
15 issued.

16 And I'm worried that if we go ahead and pass
17 Rule 45(c)(1) in the present status and then you
18 change your mind and decide you're going to take out
19 compelling circumstances, you're going to be creating
20 the possibility of a whole new way of looking at
21 remote testimony with all kinds of opportunities for
22 mischief, and it may not be the best idea to separate
23 the Rule 43 from the Rule 45 considerations. At this
24 time, you may want to consider either delaying Rule
25 45(c)(1) or maybe accelerating your concerns about

1 Rule 43 and dealing with that at one time.

2 So that's my concern about Rule 45(c), but
3 I'd like to complete my comments by saying that as a
4 non-party entity, I think that it's important that we
5 all recognize that from its very inception in 1938,
6 the rules took into account the unique position of a
7 non-party. As the Ninth Circuit explained, a non-
8 party is powerless to control the scope of litigation
9 and shouldn't be forced to subsidize the costs of
10 someone, and as I explain in more detail in the public
11 comment that I have filed, there are significant
12 issues that have arisen over the years, especially
13 since the 1991 amendments made it mandatory that cost-
14 shifting occur for significant expenses that are
15 incurred over objection when a party, a non-party, is
16 ordered over objection to comply.

17 And you will recall that your Committee has
18 at least preliminarily determined that you're not
19 going to entertain a complete review of that portion
20 of the rule, but it may well be that you may want to
21 consider at least a minor correction, as I have
22 suggested, that would deal with the problem of what I
23 call a means test, namely, that a party who has the
24 means to absorb the costs of compliance with a order
25 must do so as opposed to simply determining whether or

1 not a significant expense has occurred. I'm happy to
2 take any questions on this.

3 CHAIR VANCE: Are there any questions for
4 Mr. Allman? Rick Marcus?

5 PROF. MARCUS: Tom Allman, thank you very
6 much for these comments. One thing you said got my
7 attention. I think you said that the prior court
8 order requirement you contemplate should include the
9 court approving the place at which the testimony is to
10 be delivered. Did I hear that correctly? That may be
11 difficult to know well in advance. It might, it
12 occurs to me, be something that the witness would like
13 to have something to say about. Do you think that
14 should be part of the prior order requirement you're
15 urging?

16 MR. ALLMAN: No, Rick. I'm sorry if I gave
17 that impression. No, that's not my impression at all.
18 What I am saying is that they should be served with an
19 order that permits the remote testimony to take place.
20 Now, if the judge has specified where it's going to
21 take place, that's fine. It must meet the criteria of
22 Rule 43, but I'm not requiring that the -- that -- I
23 mean, it seems to me, Rick, that it might be inherent
24 in the order that would be presented to the court for
25 its approval and, if so, and it's in the order, then,

1 of course, it should come along with the subpoena when
2 it's served on that party because, you know, not
3 everybody who's going to be dragged into remote
4 testimony is interested in the litigation. As I said,
5 non-parties often do not have any control over the
6 litigation itself and don't have any interest in the
7 outcome.

8 PROF. MARCUS: Well, thank you. We did
9 correspond, I believe, before this meeting. I think
10 that that may be something worth pursuing, but it
11 isn't really about the part of the rules, the parts of
12 the rules that we've put out for comment, so that may
13 have to await further developments.

14 MR. ALLMAN: I appreciate it, and I admit to
15 being -- I can't separate that issue from the rule,
16 other parts of the rule, so that's why I thought I'd
17 mention it.

18 CHAIR VANCE: Are there any other questions?

19 (No response.)

20 CHAIR VANCE: Mr. Allman, thank you very
21 much for your very helpful testimony.

22 MR. ALLMAN: Thank you, Your Honor.

23 CHAIR VANCE: Let's move on to the next
24 witness, Jonathan Redgrave. Mr. Redgrave?

25 MR. REDGRAVE: Good morning, Your Honor.

1 CHAIR VANCE: Welcome.

2 MR. REDGRAVE: Appreciate the opportunity to
3 speak to you and to the Committee and will try to get
4 through my comments quickly here. I have both Rule
5 7.1 and Rule 45 on my mind. By way of background,
6 I've been in practice since 1992. I graduated in 1991
7 from the University of Minnesota Law School and served
8 a clerkship, but since 1992, I've been continuously
9 involved in litigation in both federal and state
10 courts across the country. I'm also one of the co-
11 chairs of the Lawyers for Civil Justice Discovery
12 Subcommittee, and I'm sure the Committee is well aware
13 that LCJ does make a number of submissions.

14 I'm speaking here today on my own behalf,
15 however, so I just wanted to make that clear. On Rule
16 7.1, I join Mr. Allman and others in commending the
17 Committee for addressing the important issues with
18 respect to disclosures that can help a judge make
19 their statutory and ethical duties come real in terms
20 of conflicts and potential divestment of interests or
21 refusals. I think that expanding the concept beyond
22 or behind, going beyond just corporations makes a lot
23 of sense. There are multiple types of organizations
24 that could have an interest that the judge may need to
25 know about.

1 I am a bit concerned about the concept of
2 "indirect ownership" and whether that will prove
3 problematic as it doesn't necessarily have a clear
4 definition. I recognize in the rulemaking having to
5 do some sort of proxy with the 10 percent, but as to
6 the rule itself, the text, I wanted to just call
7 attention to maybe it's an ambiguity I'm seeing but
8 something I just want to raise in case others see the
9 same thing and think there needs to be a
10 clarification, and that is the clause, the quote that
11 "directly or indirectly owns 10 percent or more."

12 It directly follows the amendment of any
13 publicly held business organization, whereas earlier
14 in the rule we have the "identifies any parent
15 business organization and," and so, when I was looking
16 at this and then looking at the comment about parent
17 and grandparent organizations, the language goes back
18 and forth in terms of are we talking about any parent,
19 grandparent organization in some sort of business
20 structure that has a 10 percent or more interest, or
21 are we only thinking about the 10 percent or more test
22 as to a publicly held business organization.

23 And that is not insignificant because, if
24 it's the former and where it's really a narrower
25 intended disclosure or disclosure requirement that

1 you're only talking about publicly held entities that
2 have some sort of 10 percent, then I think a simple
3 clarification either with punctuation or some sort of
4 subheading could help.

5 If the rule is actually meant to be broader
6 that anyone having a larger interest, whether or not
7 they're publicly held, I wonder if that will actually
8 be room for satellite litigation or concerns about
9 disclosures over time that really would be a rabbit
10 hole and not really addressing realistic situations
11 where judges would have a potential conflict because
12 they own stock in a publicly traded organization or
13 they have some sort of ownership in those
14 organizations that then trigger the statutory and
15 ethical duties. So I just raise that because I've
16 been studying this rule, and I've just been wondering
17 if I'm just in the woods by myself here or not, but I
18 wanted to raise it out of an abundance of caution.

19 And then the only other thing I wanted to
20 say on Rule 7.1 is, and following on Mr. Allman's
21 comments, that when we're talking about disclosing
22 ownership interests that could impact a judge's
23 statutory and ethical duties, we should consider
24 extending that to ownership over or control of the
25 claims in the case itself, and, yes, that's talking

1 about litigation funding, and litigation funding is
2 not a backwater of unknown private equity funders in a
3 back room somewhere. Large, institutional, and
4 publicly traded entities are now well involved in
5 litigation funding, and outcomes of matters that can
6 impact the returns for those funders and, in turn,
7 their investors, stockholders could matter.

8 And so, if judges could have investments in
9 such publicly traded entities or other organizations
10 and not realize that they're actually involved in the
11 matter, that seems to be square within the same sort
12 of concerns that the Committee is trying to address
13 with respect to an expanded rule.

14 So I just want to raise that. I know that
15 there's not an amendment necessarily on the table
16 there, but I think these concerns about why we're
17 trying to get these disclosures are important.
18 Obviously, the Committee is expanding the rule in a
19 way that, I think, does make some sense, but, again,
20 with that one clarification on how far you're trying
21 to go, that's all my comments on Rule 7.1. So, if
22 there's a question on that, happy to take that.
23 Otherwise, I'm going to move to Rule 45.

24 CHAIR VANCE: Is there a question on Rule
25 7.1?

1 MR. REDGRAVE: Great.

2 CHAIR VANCE: I have a quick question, Mr.
3 Redgrave. Do you see any ambiguity in the use of the
4 term "business organization"?

5 MR. REDGRAVE: No, I don't necessarily. I
6 think it's expanding it in the sense of I think some
7 people could probably find it, because it could be an
8 LLC, it could be any sort of Swiss verein. I mean,
9 there are so many hundreds of different types of
10 business organizations, but I think the concept you're
11 getting at is one that people should be able to
12 understand without ambiguity. My concern is actually
13 the construction of the rule itself as to whether the
14 publicly traded part is applying up the parent chain
15 or just to the second part of the phrase in subsection
16 (a).

17 CHAIR VANCE: All right. Thank you. If you
18 want to proceed with the rest of your testimony?

19 MR. REDGRAVE: Yes, Your Honor.

20 CHAIR VANCE: Thank you.

21 MR. REDGRAVE: Thank you. With respect to
22 Rule 45, I want to say I recognize that there is a
23 divergence of views here with respect to the need
24 value impact of remote trial testimony, and I think
25 people have different experiences in their cases and

1 it varies depending on the types of claims and
2 clients, and I also see the divergence in comments
3 with respect to the Kirkland decision and the existing
4 Rule 45 construct, and with that said, I think there
5 are multiple angles here, and I think what Mr. Allman
6 said about the Rule 45 connection is critical because
7 I think, if we're going to really be thinking about
8 how the future plays out and we're having remote trial
9 testimony, there need to be some clearer connected
10 guidelines for this and what is the court's
11 gatekeeping function.

12 I will note that I realize some people are
13 frustrated with the concept of geographic boundaries,
14 but we do have judicial districts, we do have line
15 drawing, and they are artificial constructs, but they
16 derive from our system of government, our founding.
17 Where we are and how we are with states, with
18 districts, it's just a reality we have, and the idea
19 of trial expedience for some parties, and I get that
20 some witnesses could be benefitted, but we can't say
21 that all witnesses would be benefitted by being
22 subject to remote trial testimony.

23 So I think there are a lot of considerations
24 being raised, and even if the pandemic showed us that
25 some things actually worked and there was a level of

1 adaptation that proved effective, that doesn't
2 necessarily mean that every trial, every case really
3 needs or should have remote trial testimony, and, in
4 fact, there are a lot of considerations with remote
5 trial testimony that I get. The arduous deposition
6 designation process, I've done it dozens of times, but
7 you actually get rulings from the court and you get a
8 much tighter presentation than remote trial testimony,
9 where you may have multiple sidebars that have to deal
10 with objections or other issues.

11 So there's no panacea here. There's no
12 clear like this is better by far than another, and I
13 think we need to keep in mind that non-parties are
14 important considerations because they do have rights
15 and protections that are impacted whatever the rules
16 are, but especially if they're requiring them to be
17 made available for a week where a trial might take
18 place and they might be required to attend, so there
19 isn't a, like, easy answer necessarily, and I
20 appreciate that the Committee is kind of weighing
21 different considerations.

22 So back to the Rule 43, 45, if, and I
23 understand that if is a reality that the Committee is
24 looking at potential changes to Rule 43 and
25 potentially with respect to the compelling

1 circumstances aspect, I think these two rules have to
2 be looked at together because, if that changes, it
3 changes exactly what Tom Allman just said about what
4 Rule 45 could be and how it would be applied in
5 practice, so whether it's accelerating that or kind of
6 just slowing Rule 45 down a bit, I think it would be
7 wise just to make sure there's no confusion or kind of
8 a two-step dance here that dramatically alters the
9 landscape.

10 I think that other witnesses will talk about
11 the potential impact of the unavailability of
12 witnesses and rules that technically apply now, but do
13 they really apply if everyone's truly available
14 nationwide, and I think I'll let them speak to that,
15 but I do want to actually step back to a couple of the
16 precise amendments to raise a couple points on
17 language, and that is Rule 45(b)(1)(A)(iii), and I'm
18 going to focus on the word "actual receipt." You've
19 got "actual receipt" there. My immediate question is,
20 actual receipt by whom? And I think it would be
21 important to actually identify what we're talking
22 about in terms of what actual receipt we're
23 demonstrating to then show that there was effective
24 service.

25 I will say I do agree with the subsection

1 (4) allowing another means that is authorized by the
2 court for good cause and reasonably calculated to give
3 notice. I've seen that circumstance, and having
4 judicial ability to find another way does make sense.
5 I think the tendering of witness fees, I would like to
6 make a modest suggestion here. I have seen some of
7 the concerns about, if we're doing alternative service
8 and we're not having contemporaneous tendering of the
9 fees, we're going to put it at the back end when,
10 actually, the compliance happens, which may or may
11 not, but yet the non-party may have had to go through
12 efforts to start to comply or actually comply, but
13 then testimony wasn't required.

14 I don't know why we couldn't have an interim
15 that just says, if you can't make contemporaneous with
16 service tendering of the fees, you have 10 days or a
17 reasonable time permitted by the court. I think that
18 would make more sense. It gives the protection to the
19 third parties. I think everyone here, regardless of
20 the side of the V they're on, they're talking about
21 trying to protect non-party witnesses from undue
22 burdens and the like, so I just respectfully submit a
23 small change like that could be very beneficial.

24 I do understand that if Rule 45(c)(2) goes
25 forward, some commenters have made some suggestions

1 about potential ambiguity about the location part. I
2 don't really have a problem with that per se. I think
3 that the Committee should consider those potential
4 changes there. I think there is an interplay with
5 Rule 26(a)(3)(A)(iii) that deals with disclosures and
6 whether those disclosures can be more than just rote.
7 You may take remote trial testimony from everybody.
8 It would be helpful to the system if that was more
9 conjoined with case management from the court and the
10 approval process in 43.

11 Last thing I want to say on Rule 45, and
12 this is really covered in the Lawyers for Civil
13 Justice commentary from October, but there really are
14 other aspects of the rule for the protection of non-
15 parties that we should be considering. The
16 compensation to non-parties for the costs of
17 compliance, it's grown dramatically in the last 20
18 years. The protections for confidentiality and other
19 security of information concerns, and then the
20 favorite rule that Mr. Marcus knows, I just labor on
21 and can't let go of, and that's privilege logging and
22 the need for 26 protections that we just had the
23 amendments go into effect, kind of yet parallel to
24 Rule 45. Those are actually all set forth in the LCJ,
25 I think Attachments A and B to that October

1 submission.

2 So, again, I do endorse those. I think
3 those would be helpful for the practice, but to the
4 bigger picture again, Rule 45 conjoined with Rule 43,
5 I just don't see how you can't deal with those
6 together, especially if there's going to be a
7 meaningful change to 43.

8 CHAIR VANCE: All right. Thank you so much,
9 Mr. Redgrave.

10 Are there any questions for Mr. Redgrave?
11 Yes, Rick Marcus.

12 PROF. MARCUS: Thank you very much, Jon.
13 With regard to 45(c) and the Kirkland decision, it
14 seems to me that this is principally about whether the
15 witness is within "subpoena range" or not, and in
16 terms of witness interests, are they really different
17 if you don't have to show up at the courthouse and you
18 can go someplace more convenient? That's one
19 question. And the other one I think I asked someone
20 else about, but I'm asking you about also, could you
21 say a bit about your experience with adequate
22 safeguards, what those are and whether they work?

23 So one question is why is 45(c) connected so
24 clearly to 43(a) in your mind since even the Kirkland
25 decision would permit service of a subpoena for

1 testimony from the other side of the state and in
2 California, that could be a long way off, and also,
3 what are adequate safeguards in your view, and what
4 has your experience been in arranging them?

5 MR. REDGRAVE: So two things. First of all,
6 I think the connectivity between the two is,
7 currently, there is a governor in 43 on trial
8 testimony and in 40, when you talk about subsection
9 (c) and the Kirkland decision and, you know, the prior
10 amendments for service, which were meant really to
11 provide a more efficient way of serving and getting
12 witnesses through deposition and being able to do Rule
13 45 practice, I think there's a reality of trial
14 testimony. You know, you're taking depositions and
15 they are effectively trial testimony, right?

16 You're taking depositions for admission-
17 driven purposes. You're not really doing discovery.
18 Everyone does it to secure potential future trial
19 testimony so it is treated with the same level of
20 respect by witnesses and by counsel. I think that the
21 decades of experience have shown that being able to do
22 it that way has been effective. I do get that some
23 people would prefer the witnesses live, but I think
24 there's an element of the reality of trials that when
25 you're doing it remote, they're just a different

1 aspect and tenor of the remote testimony by witnesses
2 that can't be discounted.

3 I think, in terms of your question of
4 adequate safeguards, practically, in my experience,
5 the parties have actually worked together in terms of
6 finding ways, and most judges that I've appeared in
7 front of are mindful of potential impacts on non-party
8 witnesses that may be remote, so I don't want us to
9 always devolve to the lowest common denominator or
10 worst possible situation, and I don't think that the
11 Committee does either in its rulemaking.

12 However, I do, going back to the top point,
13 think it's important to realize that if the Rule 43
14 governor, as I'm calling it, on compelling
15 circumstances, if that's released, you might end up
16 with a very different practice than you expect with
17 respect to witnesses and non-parties and the
18 proliferation because it's no longer going to be any
19 real restriction, right? And, quite frankly, I think
20 one of the later witnesses is going to talk about the
21 impact on when is a witness really unavailable for the
22 purpose of even bringing in their deposition.

23 I mean, forget it. They're all available,
24 and I think there's got to be some level of balance
25 here which then gets back to the judge and really

1 being able to work with the parties on a true case
2 management/trial management plan and understanding
3 who's going to be, you know, any of the realistic
4 witnesses where you're going to be seeking remote
5 testimony, especially as a lot of these people can be
6 former employees, they could be, you know, witnesses,
7 they could be others that just are no longer within
8 the court's, and I mean the sitting court, the one
9 that's actually having the trial, subpoena power,
10 right, but they are within, you know, a district
11 somewhere else where they could be compelled to
12 attend.

13 So the truth is, Professor Marcus, that I
14 find this to be a -- I don't want to say more nuanced,
15 but I think it's a challenging rule because I think
16 you've got a couple different sides of it where people
17 are going to be somewhat adamant. I can see pros and
18 cons to this. I just believe that there has to be a
19 connectivity, a connective tissue between 43 and 45 in
20 good judicial case management, trial management.

21 CHAIR VANCE: Mr. Redgrave, Judge Lauck has
22 a question.

23 JUDGE LAUCK: So I'm aware we're probably
24 well over our time, but, Mr. Redgrave, I'm struggling
25 to understand what you mean when you say there is a

1 qualitative difference in live, remote live testimony
2 and deposition testimony and inferring that the
3 deposition testimony is, I think, better, and I guess
4 I'm trying to understand what is worse? Like, are you
5 talking about studies that have shown that live remote
6 testimony is worse for a trial experience than
7 deposition experts' excerpts? I'm really trying to --
8 you say it's qualitatively different, but I guess I'm
9 trying to understand how. What is the negative of it,
10 aside from strategy? I understand what you're saying
11 about that, but you said the experience is worse, and
12 I want to understand what you mean by that.

13 MR. REDGRAVE: Well, Your Honor, thank you
14 for the question, and I appreciate the opportunity to
15 clarify. I think I was trying to say it can be worse,
16 it can be better. I don't think it's a black and
17 white that, you know, having live, direct trial
18 testimony is necessarily always better. I think there
19 can be complications, especially depending on what the
20 nature of the testimony is. If it's someone where
21 there's a lot of potentially privileged issues, you
22 may need to do some pre-testimony.

23 There are things that a judge can do to
24 potentially get through that in advance with in limine
25 motions, and I think that just like we shouldn't

1 assume that, you know, prior deposition testimony in a
2 practice we've had for decades is bad per se, I'm not
3 saying that live trial testimony is bad per se either.
4 I don't think there's necessarily a quantitative leap
5 in value for, I think, what one of the witnesses said
6 was the right to immediately confront live on screen
7 in front of a jury over the fact that you did confront
8 the witness under oath, usually videotaped for the
9 last two decades.

10 So I think my point there was that both
11 actually provide valid trial testimony, right, and
12 you've got different procedural mechanisms you have to
13 go through, whether it's the designation process,
14 which, yes, can be laborious, but you've also got
15 laborious issues with respect to trial testimony, and
16 that's where I was going with my comment there's no
17 panacea here. It's not that one is magically better
18 than the other, but I think it has to be one where
19 there is judicial management with Rule 43 that can be
20 mindful of what exactly are we doing. We're not just
21 blanketing the world with now we're just going to
22 bring everyone in remote because there are
23 circumstances where time has passed and it actually is
24 more inconvenient for a witness who was previously
25 deposed to then also show up at trial because they're

1 going to now have two shots or be subject to two
2 different sittings, right?

3 And, of course, other witnesses are all the
4 time. I get that. But, again, my point here is that
5 it isn't like there's a clear winner, that one must be
6 the preferred alternative over the other.

7 CHAIR VANCE: All right.

8 JUDGE LAUCK: All right. That's helpful.
9 Thank you for --

10 MR. REDGRAVE: Thank you for the opportunity
11 to clarify, and thank you, Your Honor, for the
12 opportunity to testify today on both rules.

13 CHAIR VANCE: All right. Thank you very
14 much, Mr. Redgrave, for your helpful testimony.

15 I think we will take the morning break now
16 and resume with Ms. Kotulski's testimony after the
17 break, and the break will end at 11:10. Thank you.

18 (Whereupon, a brief recess was taken.)

19 CHAIR VANCE: All right, everybody, we're
20 ready to resume with our next witness, is Melissa
21 Kotulski. Ms. Kotulski, are you ready to proceed?

22 JUDGE KOTULSKI: Yes, I am, Your Honor.

23 CHAIR VANCE: Thank you.

24 JUDGE KOTULSKI: Good morning, everyone. I
25 am the President of International Attestations, and I

1 have been working, hopefully tirelessly, to get things
2 done at the international level and sort of represent
3 our nation in some fashion and hopefully eventually
4 brought in a docket of my own in the international
5 world. That includes things where I have expertise in
6 International Court of Justice and the Court of
7 Arbitration for Sports and things of that nature. I
8 also have looked to the International Law Commission,
9 which is, I think, very important and will factor
10 heavily in my comment, particularly because they're
11 behind the codification and development of
12 international law.

13 With that being said, we currently have no
14 member on that body from the United States of America,
15 which is almost unprecedented, so I think, with rules
16 that you have been presenting here in the civil
17 procedure realm, I would like to give laudatory
18 measures to the work of the Committee as well as the
19 Administrative Office of the Courts for focusing on
20 especially that organizational shift from corporations
21 to organization. That will be a fundamental
22 consideration as I proceed with my with my comments
23 and my testimony, particularly because I think it
24 helps to protect the interests of the United States in
25 the international realm by bringing terms or

1 broadening the terminology beyond corporate, but also
2 sort of bringing what they often say, even within
3 International Court of Justice jurisprudence, a
4 piercing behind the corporate veil so that we can
5 bring them to the table.

6 So, quickly, I'm going to look at the first
7 three rules, which is Rule 26 and 45 as well as 41. I
8 just have a quick comment about 41, wondering if
9 perhaps this may bring back line-item veto days of
10 yore and some of that jurisprudence may come forward
11 as people think about that claims preclusion versus
12 issue preclusion and things of that nature.

13 The other part of it which I didn't fully
14 touch upon, but besides being a Court of Arbitration
15 for Sports person, I also have expertise in cyber
16 worlds, even participating with some of our military
17 engagements concerning that. And I was pleased to see
18 that that seems to be a major theme not just within
19 the civil procedure world but also in the evidence
20 world concerning remote testimony and other
21 protections that you can put into place procedurally
22 for working within the courts system so that people
23 can get there mostly for convenience. I really was
24 pleased to hear about the substantive part versus the
25 procedural part, as Mr. Millrood had commented. That

1 was particularly interesting to hear his
2 distinguishability or distinguishing of the two.

3 The substance or the primary -- the next
4 part that I want -- oh, and before moving on to the
5 business organizations more substantively, I wanted to
6 look also very quickly and make a comment and say
7 perhaps maybe this is something for the future or
8 maybe something that you're starting to sort of bounce
9 around, but thinking of how to sort of wrangle
10 everybody in the cyber world. While you do have those
11 remote testimonies procedurally, will you have a cyber
12 marshal? Will you have a cyber deputy?

13 Those are things that I think will be
14 helpful considering you have people perhaps in
15 Tennessee, California, Kentucky, all over the states
16 and maybe even the world, and all the various -- and
17 my cyber law professors say it becomes a conundrum of
18 who is where, but I think, again, Mr. Millrood's
19 comment might help get you to a cyber marshal or cyber
20 deputy that could help wrangle that together.

21 The final part of what I wanted to look at
22 is really the meat and potatoes of what I'm here for
23 today mostly, is Rule 7.1. The non-governmental
24 business organizations, I just want to make clear that
25 I think that's an interesting shift from corporations

1 to organizations especially, and I think that there
2 are three principal cases that I look at at the
3 International Court of Justice level that I think
4 will -- well, that I know I will parse out further
5 when I give the comment, but first is the certain
6 assets case with the Iran and the U.S., and in that
7 case, there's definitely a calling to task of the
8 United States of America.

9 And I think, with this rule, you are
10 starting to shift towards better compliance so that we
11 can forestall any future issues with governments that
12 bring us to the International Court of Justice,
13 especially since we had our judge ad hoc, which is
14 basically when you don't have a judge on the court
15 that is not conflicted, you are allowed to choose a
16 judge outside of the International Court of Justice
17 community to serve the interests on the court during
18 the proceedings.

19 So Iran had one and so did the United States
20 in this rare instance where there was recusal. I
21 think Joan Donoghue had some conflicts of interest,
22 but Barkett did say corporation status comes up with
23 corporate status should be recognized to assure the
24 right of foreign corporate entities to free access to
25 courts to collect debts, protect patents, enforce

1 contracts, et cetera. So Barkett was acknowledging
2 that there will be that international group that comes
3 to the table. And I'm sure that your courts' dockets
4 are probably filled with them, and so it's probably
5 interesting to look to that.

6 Now the other two cases that I want to
7 quickly bring up are the Qatar versus The United Arab
8 Emirates. That case basically touches upon media
9 organizations and did not go to its merits because of
10 the details that came through in that case. The final
11 thing is the climate change advisory opinion, where I
12 wanted to make sure and make note of how more
13 corporate voices were heard during this particular
14 advisory opinion, and I think it was important to have
15 them there, especially and most notably OPEC.

16 I think the Organization for Petroleum
17 Exporting States, they presented not just favorably
18 for corporation but also showed a sense of corporate
19 responsibility when it came to climate change too. I
20 think that shifting to international organizations
21 broadens that statement and brings more people to the
22 table and also shows a good-faith intention to, you
23 know, be a responsible business in the broader
24 international context.

25 I want to quickly talk about the

1 International Law Commission. The International Law
2 Commission is the developing and codification of laws,
3 and that's why I think it's very good that we have
4 this new set of terminology in civil procedure because
5 they themselves focus in large part on organizations
6 and they're part of the codification and development,
7 and that means that we as the U.S. and other nations
8 have to report in order to show compliance and show
9 also where we're going with regard to international
10 law, and I think this will be a good step in that
11 direction, and I hope that you consider those cases as
12 you proceed.

13 CHAIR VANCE: All right. Thank you. Thank
14 you so much, Ms. Kotulski.

15 Are there any questions for Ms. Kotulski?

16 (No response.)

17 CHAIR VANCE: All right. Hearing none,
18 let's move to the next witness. Thank you so much for
19 your comments.

20 JUDGE KOTULSKI: You're welcome.

21 CHAIR VANCE: All right. Our next witness
22 is Lauren Barnes.

23 MS. BARNES: Thank you, Your Honor.

24 CHAIR VANCE: You may proceed. Good
25 morning.

1 MS. BARNES: Good morning. Thank you, Your
2 Honor. I appreciate the opportunity to appear before
3 the Committee this morning. Just for some background,
4 so in November of 2025, I stepped in as the acting CEO
5 of Public Justice, which is a nonprofit legal advocacy
6 organization that really uses litigation as our
7 primary tool to fight some of the biggest systemic
8 threats to justice of our time, which includes
9 corporate practices, it includes civil rights and
10 civil liberties violations, and it includes attacks on
11 the Earth's sustainability.

12 Before that, for approximately 20 years, I
13 was with Hagens, Berman, Sobol, Shapiro as a
14 litigator, ending as a partner there for about 10
15 years, where I did primarily complex class action
16 litigation across the country, massive MDLs, primarily
17 antitrust and consumer protection cases, and so the
18 perspective that I bring here today is really informed
19 by that.

20 I'm here to talk about Rule 45(c) as well as
21 Rule 43. My comment on Rule 45(c) is I think this is
22 a very modest change that the Committee has proposed.
23 I'm fully in support of the change that's been
24 proposed. I think it is simply bringing the practice
25 and the text of the rule into line with what was

1 intended with the 2013 amendments and the way that
2 this should be done. There has been confusion about
3 what should be happening in the wake of In re:
4 Kirkland, and this is really just bringing things back
5 into the practice that was intended.

6 What I've noticed in a number of the
7 comments that have been submitted and part of what
8 I've heard so far this morning is that there's not a
9 lot of real pushback to the change to Rule 45, and,
10 instead, the questions that are coming up and the
11 concerns that are being expressed are around issues
12 relating to Rule 43, so I want to take a couple of
13 minutes just to touch base on that and to answer any
14 questions that the Committee members have.

15 I encourage the Committee, the Rule 43/Rule
16 45 subcommittee, to continue its work on Rule 43. I
17 do think it's important for Rule 43 to be addressed
18 and to be updated. I don't know that I agree with
19 some of our other speakers on the need to do them at
20 the same time. I think this is the right first step
21 with Rule 45. The question really with Rule 43 that I
22 think is coming up here is whether and how we should
23 be permitting remote testimony, whether and how remote
24 testimony should be -- whether that should be the
25 default second best option or whether it should remain

1 deposition testimony.

2 So, from my perspective both at the helm of
3 Public Justice and having litigated for 20 years, I
4 really see this as an access to justice issue. There
5 are so many ways in which not being able to be in
6 court can prevent people from adequately having their
7 rights heard, and that's frequently whether you're
8 talking about somebody who's been incarcerated,
9 somebody who is deployed overseas, weather emergencies
10 like we've all just had this week, family emergencies.

11 There are a number of things that come up
12 that can prevent people from being in court to provide
13 their live testimony at the same time, but I can tell
14 you I have never encountered a plaintiff who does not
15 want to be in court, who does not want to be in front
16 of that judge, who does not want to be in front of
17 that jury and be able to tell their story. That's not
18 where we have the issues. And the concerns being
19 raised seem to me to be suggesting that if there is a
20 change made to Rule 43, the new reality that's going
21 to come in is that everything is fully remote, that we
22 will all be remote and nobody will be live anymore.

23 I just don't see that. In my experience,
24 that's not the case certainly on the plaintiffs' side
25 of the V. The question is, if we keep live, in-person

1 testimony as the gold standard, what is the second-
2 best option? And I submit that the second-best option
3 is permitting people to be remote with live
4 contemporaneous testimony. It's not deposition
5 testimony.

6 We have seen how problematic deposition
7 testimony can be, and a few examples from my
8 experience, tape is stale, right? Often, in these
9 cases, videotape depositions were taken five, six,
10 seven, eight years before they're ever being played in
11 front of a jury or a judge, so not only are they old,
12 things may have changed. You're also dealing with
13 basically disembodied voices and an unmoving head and
14 torso that, frankly, cannot compete and keep the
15 attention of juries and probably judges in this
16 context.

17 I mean, look, we've seen trials where we
18 have days and days of videotaped deposition being
19 played, and the reason that that videotaped deposition
20 is being played, I want to make clear, is it's not
21 because the plaintiffs aren't showing up, and it's
22 usually in the cases that I have worked on, it is the
23 defendant, which is usually a corporation, who refuses
24 to bring many, if not all of their personnel, and so
25 the depositions that are being played are of a party

1 who has refused to bring any or make any of their
2 people available, so we have hours and hours and days
3 and days of testimony, and despite best intentions by
4 jurors, and I really do believe that most jurors are
5 in there trying to do their level best to deliver
6 justice.

7 I mean, who among us hasn't fallen asleep
8 during a movie? We're asking them to watch days and
9 days of incredibly boring, unmoving pictures, right?
10 The idea that that is what should be the default in
11 this world where we have all learned how to do this,
12 how to do exactly what we are doing here today in an
13 iterative back-and-forth way, that that can't be the
14 second-best option, that's really what we should be
15 looking at.

16 Also, there's rarely cross-examination in
17 these depositions, right? You're not getting the
18 back-and-forth. You're not really getting the
19 questioning. One of the prior speakers just talked
20 about the fact that deposition videotapes, that
21 testimony is often used for trial and people know it's
22 going to be used for trial. That's true. In my
23 cases, we always assumed that that deposition we were
24 taking was not just a discovery deposition, because it
25 is, we do have to discover some things, but that we

1 also had to get testimony for trial because we assumed
2 we would never get that defendant back in front of a
3 courtroom.

4 But you still end up with this gummed-up,
5 loaded-up designations from both sides having to be
6 played where the story is very difficult to follow,
7 which leads me to -- I'll stop after this last point
8 about the deposition issue. The amount of time that
9 gets spent by parties and by the court in advance of
10 trials trying to deal with deposition designations I
11 think is a travesty. The back-and-forth, the
12 objections that get raised, the designations that get
13 put in to gum up the other side's attempt to tell a
14 story in front of the jury, requiring judges to get
15 scores of depositions of hours and hours and hours of
16 stuff to rule on, often which judges basically say, I
17 don't want to deal with this right now because I know
18 you're all going to cut it down in the end, and that
19 is what happens.

20 People get a little more serious as they get
21 to trial, but it's still a huge, I think, a waste of
22 time and effort that can be spent on other pieces to
23 try to really bring justice to these parties. So I
24 encourage the subcommittee to continue the work with
25 Rule 43. It's critical for us to address this to,

1 frankly, just bring the rules up to reflect the modern
2 reality that we're living in today. And with that, I
3 will pause for questions.

4 CHAIR VANCE: Are there questions for Ms.
5 Barnes? Ms. Barnes, I don't see any questions for
6 you.

7 MS. BARNES: I see that Mr. Marcus raised
8 his hand.

9 CHAIR VANCE: Yeah, he's just belatedly
10 raised his hand. Go ahead, Rick.

11 PROF. MARCUS: Sorry about my lag time
12 there. One of the things, this is not about the Rule
13 45(c) question, but you brought up Rule 43(a), and
14 some people have told us that the compelling
15 circumstances limitation there accommodates the kinds
16 of situations that I think you were describing. It
17 seems others say no, it's too restrictive. I wonder
18 what your views are because that could be important
19 going forward if and when we do on Rule 43.

20 MS. BARNES: I do think that the compelling
21 circumstances is too restrictive in this day and age.
22 There are times where somebody won't be able to meet
23 them because, despite best intentions, they planned to
24 be there live for their testimony and they had a
25 family emergency, right? That's the kind of thing

1 that would permit for compelling circumstances, but
2 the way in which, in my experience, this has played
3 out in our cases where we are not permitting remote
4 testimony where it would be beneficial to the jury and
5 to the court is that far more often we're seeing the
6 defendants unwilling to bring people because, right,
7 we're often dealing with companies that have personnel
8 located all across the country, but we have to pick
9 one district to bring this case in, so, by necessity,
10 all of their people aren't going to be there.

11 Now they can compel the plaintiffs, who
12 decided to bring their case there, right? The class
13 representatives, for example, have to show up if
14 they're desired by the other side, but the defendants
15 don't have to, and that's where I think we really are
16 doing a disservice to the juries is because so much of
17 a case is being put in through deposition testimony
18 because we can't necessarily meet a compelling
19 circumstances where it doesn't seem like there's an
20 emergency.

21 It's just the fact that in this day and age,
22 we have people spread out all over. I mean, even when
23 we're with Public Justice, for example, now, which
24 used to be all in D.C., now we have only about a third
25 of our people in the greater D.C. area because the

1 world has changed and people have found other --
2 people can do their work remotely, for example, so
3 they don't have to be in the same place, and that is
4 doing a disservice, so loosening up those restrictions
5 on Rule 43, not to the extent that you would say,
6 yeah, we're always going to do remote instead of --

7 CHAIR VANCE: You've frozen.

8 MS. BARNES: -- next best option rather than
9 having to go to the deposition.

10 CHAIR VANCE: Any other questions for Ms.
11 Barnes?

12 (No response.)

13 CHAIR VANCE: All right. Thank you so much,
14 Ms. Barnes. Your testimony's been very, very helpful.

15 MS. BARNES: Thank you.

16 CHAIR VANCE: Let's move to the next
17 witness, who is Xiomara Damour.

18 MS. DAMOUR: Hello. I'm Xiomara Damour.
19 I'm a mid-level litigation associate at Mayer Brown,
20 and my testimony today will focus on the need for the
21 Committee to provide clear guidance on privilege
22 logging requirements for subpoenaed non-parties. As
23 currently written, Rule 45 requires subpoena
24 recipients who withhold materials under a claim of
25 privilege to expressly make the claim and describe the

1 nature of the withheld documents, communications, or
2 tangible things in a manner that, without revealing
3 information itself, privileged or protected, will
4 enable the parties to assess the claim.

5 To comply with this rule, non-party subpoena
6 recipients often must devote significant attorney and
7 staff time to draft such logs and to assess scope and
8 apply applicable privilege. Today's technology may
9 assist, such as AI, but legal review remains
10 necessary, and the cost burden persists for non-
11 parties regardless. Moreover, given the posture of
12 non-parties in relation to the litigation, this work
13 imposes an undue burden under Rule 45 that is
14 disproportionate to the needs of the case under Rule
15 26(b)(1).

16 To remedy this issue, Rule 45 should be
17 amended to provide clear guidance to non-parties
18 facing Rule 45 subpoenas, including stating that
19 document-by-document privilege logs are not required
20 in all cases, recognizing that post-complaint
21 attorney-client communications and work product need
22 not be logged absent compelling circumstances, and
23 clarifying that related expenses constitute
24 significant expense under Rule 45 and are therefore
25 compensable by the subpoena issuer.

1 The Advisory Committee note to the 2015
2 amendment of Rule 1 emphasizes cooperation and the
3 reduction of cost and delay. Clarifying Rule 45 in
4 the manner proposed would harmonize non-party
5 obligations with Rule 1 and Rule 26(b) (1)'s
6 proportionality principles and would discourage the
7 overuse and misuse of procedures that increase cost
8 without a comparable benefit. And I'm open to
9 questions.

10 CHAIR VANCE: All right. Are there any
11 questions for Ms. Damour?

12 MS. DAMOUR: Yes.

13 CHAIR VANCE: Rick Marcus?

14 PROF. MARCUS: Thank you very much. I do
15 have a couple of questions. One of them, I think,
16 just to make sure I'm clear on what you are saying,
17 and that is you are focusing, I think, mainly on Rule
18 45(e) (2) (B). That's the provision -- well, 45(e) (2)
19 on claiming privilege or protection in the subpoena
20 rule, right?

21 MS. DAMOUR: Correct.

22 CHAIR VANCE: Right.

23 PROF. MARCUS: Okay. Well, I think that's
24 not part of our package, but it is very helpful to
25 hear about these issues. We have been working on, and

1 I think it's now in effect, a directive in regard to
2 privilege logging that says the parties must meet and
3 confer about that. Do you have experience with that
4 sort of meet-and-confer activity?

5 MS. DAMOUR: No, but I do with the privilege
6 logging drafting process.

7 PROF. MARCUS: Do you find that parties that
8 serve subpoenas are unwilling to talk about how best
9 to go about preparing what the rule requires in terms
10 of what we're calling privilege logging?

11 MS. DAMOUR: No, I think parties are willing
12 to engage in those discussions even though I haven't
13 been a part of them myself.

14 PROF. MARCUS: Okay. Well, that's the kind
15 of thing that may be important to us going forward,
16 and I guess we're going to see, maybe we're going to
17 see what happens with the change affecting party
18 discovery, which is somewhat different from subpoena
19 situations.

20 CHAIR VANCE: Is that it? All right. Thank
21 you so much, Ms. Damour, for your comments.

22 We'll move on to the next witness, who is
23 Alex Dahl. Alex?

24 MR. DAHL: Thank you, Judge Vance. This is
25 Alex Dahl from Lawyers for Civil Justice, and thank

1 you to you and to the members of the Rules Committee.
2 I apologize for doing this by telephone, but I've been
3 separated from my usual equipment by flight
4 cancellations, so I hope you'll indulge me on the
5 phone here. I'd like to talk mostly about the
6 proposed amendment to Rule 45 dealing with methods of
7 service, but I also have a brief observation about
8 remote testimony at the end.

9 Our view is that the risks of amending the
10 rule about methods of service are much greater than
11 any marginal need or benefit that could come from the
12 amendment, in particular, because the increased
13 uncertainty that the amendment would create about
14 methods of service would lead to more litigation over
15 untested methods of service and cause the very
16 wasteful litigation activity that the Committee is
17 proposing to address.

18 If the Committee does proceed, we would urge
19 making abundantly clear that any new methods of
20 service are only allowed if the existing methods are
21 tried and fail. In particular, we oppose elimination
22 of the witness fees requirement as to be tendered at
23 the time of service. We view that as contrary to the
24 rule's purpose and really unrelated to any idea of
25 helping to solve for people who unfortunately and

1 inappropriately try to duck service of process, and
2 the cases that are cited in the rules committee
3 materials demonstrate that the change of the witness
4 fee tendering would have nothing whatsoever to do with
5 the unfortunate facts of the cases and their outcome.

6 So, in contrast to the proposal, we think
7 there are three compelling needs for the Committee to
8 address in Rule 45 that are really focused on,
9 embedded in the rule's purpose, which is to protect
10 non-parties to the litigation.

11 The first has to do with making clear that
12 the party who subpoenas a non-party is responsible for
13 the expenses that the subpoena creates for the
14 recipient. This is a real rules problem, and the
15 reason is that the meaning and the effect of Rule 45
16 has been changed from what the Committee meant at the
17 time it wrote it. You know, the 1991 amendments were
18 focused on misuse of discovery, of subpoenas in
19 discovery, and provided a protection for that.

20 But what's happened with the explosion of
21 information and the new world of e-discovery is that
22 "significant" expenses are very often present even if
23 the subpoena is completely legitimate and not a
24 misuse, and yet the non-party, who has nothing to do
25 with the scope or outcome of the litigation, is often

1 stuck with the cost of helping parties, and their only
2 remedy is to bring motions, and a lot of them are not
3 in a position to do that, so it's much more
4 appropriate for the rule to set out the standard that
5 the subpoena issuer pays those expenses.

6 The second reason why this is a real rules
7 problem that needs to be solved is that many courts
8 have effectively rewritten this rule in case law to
9 impose something that the Committee never mentioned or
10 adopted, and that is a means test. The case law often
11 says that the question is whether the non-party,
12 stranger to the litigation, can afford it, and that
13 has nothing to do with what the rule is intended to
14 do, to protect a non-party from bearing the cost of
15 somebody else's lawsuit. So that part of the rule
16 needs to be rewritten to make clear that any expense
17 or significant expense is paid for by the party when
18 they ask a non-party to pay.

19 I highly commend the Committee's attention
20 to Professor Fitzpatrick and Tom Allman's very
21 thoughtful and appropriate suggestions for amending
22 the rule in addition to the suggestion we put in our
23 public comment.

24 The two other topics, first is guidance on
25 privacy and confidential information. As you well

1 know, there's no contemplation of privacy or cyber
2 protections in Rule 45 right now. It's particularly
3 poignant because non-parties often have no idea that
4 their data is being requested in litigation, and even
5 if they are aware, the remedy is too costly or
6 cumbersome or they don't know how to do it being non-
7 parties to the case. It is far better for the rule to
8 set the standard than to outsource the creation of
9 those standards onto non-parties to the litigation,
10 and there's proposed rule language in our LCJ public
11 comment.

12 Finally, as to privilege logs, you know, the
13 Committee recently revised Rules 16 and 26 to include
14 some discussions about privilege logs. While the
15 Committee discussed those amendments, it put a
16 bookmark on Rule 45, saying that Rule 45 was not open
17 for rulemaking at that point, despite the urging of
18 several commentators, including Robert Keeling and
19 Facciola and Redgrave and others, so here it is, an
20 opportunity to do what was discussed a couple years
21 ago, amend Rule 45 to make sure that non-parties have
22 guidance about privilege logging.

23 To Professor Marcus's question to the
24 previous witness, keep in mind that non-parties don't
25 participate in Rule 16 and 26 discussions and

1 conferences, so those rules are providing no remedy to
2 the problem that we're focused on here with non-party
3 subpoena recipients. So our suggestion is that the
4 rule be clarified for non-party subpoenas to say that
5 document-by-document logging is not required when
6 there are alternatives that are equally if not more
7 efficient, that some categories of documents do not
8 require logging, and that the requesting party should
9 pay for appropriate logging.

10 That's it for my comments on methods of
11 service. I do have an observation about remote
12 testimony, but I'll defer to you to whether to take
13 questions on Rule 45 first or not.

14 CHAIR VANCE: Are there questions about Rule
15 45? I have a question. You expressed concerns about
16 unintended consequences in these enumerated methods of
17 service of the subpoena, and I was just wondering
18 whether the first two methods are methods that you
19 would see as boding potentially unintended
20 consequences, and those are delivering in person and
21 then to the usual place of abode by a person of
22 suitable age and discretion who resides there?

23 MR. DAHL: Those aren't particularly the
24 ones that I think are the most in jeopardy. I think
25 that when you get to the ones about service by email

1 and social media things, that's where it gets pretty
2 complicated.

3 CHAIR VANCE: But those aren't proposed,
4 though.

5 MR. DAHL: But I do think even those that
6 you mentioned are going to be brand new and they're
7 going to be tested, of course.

8 CHAIR VANCE: But those are the same way you
9 serve a summons and complaint. They're very familiar
10 terms. I seem to remember them from law school, and
11 that was, trust me, a long, long time ago, so I'm
12 perplexed at what problems those two methods could
13 engender.

14 MR. DAHL: Yeah, I see your point. I guess
15 I see the opposite side. I'm perplexed at what those
16 would solve. You know, particularly the two cases
17 cited by the Rules Committee really don't seem to show
18 that a change of the rule is going to change the
19 circumstances of these unfortunate instances where
20 people are trying to duck service.

21 CHAIR VANCE: All right. I think Rick had a
22 question. You want to quickly talk about Rule 45?

23 MR. DAHL: Yes, thank you.

24 CHAIR VANCE: Proceed.

25 MR. DAHL: My observation on Rule 45 and 43

1 and remote testimony is two things of great
2 importance. One is to do any changes to Rule 43 at
3 the same time as the proposed amendment on 45 dealing
4 with remote testimony. It seems that what is
5 happening is a decision first to open the barn doors
6 and, second, to decide which horses should leave and
7 go where, and the idea of making clear that subpoenas
8 for remote testimony are effectively nationwide
9 service first available to everybody and then decide
10 what the standards and rules should be around those at
11 a later date is really just putting the order
12 backwards, and those things should be together.

13 In that process, I would urge that the most
14 important thing for the Committee to do is ensure that
15 the judge is involved in deciding whether a subpoena
16 goes out for remote testimony. There is just way too
17 much opportunity for prejudice and mischief and
18 gamesmanship and other things to allow unfettered
19 nationwide subpoenas for remote testimony to go out.
20 The dynamic is just very complicated. People can't
21 put 30 lawyers in 30 different locations just in case
22 they end up testifying, and the amendment to Rule 26
23 requiring notice very early in the case isn't going to
24 solve that problem, so it's important that the judge
25 decides that remote testimony is appropriate first

1 under whatever standards and then the subpoena goes
2 out. That seems to be the critical path of these two
3 areas of amendment about remote testimony.

4 CHAIR VANCE: All right. Are there any
5 questions for Mr. Dahl on this rule? Yes, Rick?

6 PROF. MARCUS: Alex, thank you very much for
7 these comments. I think David Wright has a question
8 also, but I'm wondering, do you disagree that in big
9 states like California and Texas, without getting any
10 advance permission from anybody, one can serve
11 subpoenas on people and make them show up for trial?
12 So I'm not clear on why the door isn't already open
13 for that, and it seems to me that maybe what the
14 change does is to at least open a door for a judge to
15 authorize remote testimony from somebody outside the
16 state. Am I getting this upside down?

17 MR. DAHL: Well, I think the Committee's
18 theory of why an amendment is needed is that some
19 courts are not allowing it right now, so that's why I
20 believe that the Committee thinks anyway that changing
21 the location of the testimony definition would allow
22 more subpoenas for remote testimony, so I think that
23 if I'm reading that correctly, that's the Committee's
24 case for doing it.

25 CHAIR VANCE: All right, Mr. Wright. I mean

1 David Wright.

2 MR. WRIGHT: Yes. Yeah, we've received some
3 comments with respect to Rule 45 that there's an
4 omission because there's no attempt to address service
5 on a corporation, which is true. Rule 4 does address
6 that, Rule 45 does not, and there have been some
7 comments particularly with respect to 30(b)(6)
8 service. Is that something you have a view about,
9 that is, whether or not some of the comments, for
10 instance, that would provide for service upon a
11 corporation in a 30(b)(6) context on someone
12 authorized to receive service by law, is that -- do
13 you have a view about whether that would be salutary
14 to add, or should we just leave it as it is?

15 MR. DAHL: My view is that the status quo is
16 working better than broadening the definition. The
17 problem faced, my understanding, in a lot of big
18 companies is that lawyers and people think that
19 serving any of their locations is effective service,
20 and the idea that there would be a broader menu of
21 ways to serve and untethered by the current rules
22 makes me worried that there will be more and more
23 litigation over whether a particular method was
24 successful.

25 So I don't think there's a sense that there

1 is a problem under the current rules with serving
2 companies, including 30(b)(6) depositions, as you just
3 mentioned, but there is some danger that a new rule
4 with lots of other methods would lead to circumstances
5 where new methods of service are, you know, factually
6 ineffective that do not provide the notice that is
7 given under the current rules.

8 MR. WRIGHT: Thank you.

9 CHAIR VANCE: Any other questions for Mr.
10 Dahl?

11 (No response.)

12 CHAIR VANCE: Alex, thank you so much, and
13 sorry about your plane problems.

14 MR. DAHL: Thank you, Judge.

15 CHAIR VANCE: I hope you have a safe rest of
16 your trip, wherever you're going.

17 MR. DAHL: Thanks for the opportunity to
18 speak today. Thank you very much.

19 CHAIR VANCE: Thank you.

20 All right. Our next witness is Navan Ward.
21 Mr. Ward, you're on.

22 MR. WARD: Good morning.

23 CHAIR VANCE: Proceed.

24 MR. WARD: Good morning, everyone, or I
25 guess mid-morning, I guess, at this point in time.

1 Thank you for providing me an opportunity to comment
2 on the proposed amendments to Rule 45(b), service of
3 subpoenas. Again, my name is Navan Ward, and I'm a
4 past president of the American Association for Justice
5 and a partner at the law firm of Beasley Allen, and
6 regardless of the type of practice area that many of
7 my fellow AAJ members practice in, we regularly
8 service subpoenas for witnesses to appear at trials,
9 hearings, and depositions, so AAJ supports the
10 proposed amendment and suggests some modest changes to
11 improve the rule supporting the goal of this Committee
12 to improve effective and efficient service.

13 When AAJ members learned that the Advisory
14 Committee was in its early stages of considering an
15 amendment on subpoena delivery, there was no shortage
16 of stories regarding difficulties with parties who
17 evade service. Many of these individuals are
18 extremely wealthy. They use their resources to hide
19 behind gated walls often protected by security in
20 gated communities. They're rarely seen in public,
21 making typical service by a service processor
22 challenging.

23 As a plaintiff lawyer, I had the unique
24 experience of being a defendant in a case recently,
25 and even though I'm not wealthy and always seen in

1 public, unlike many of the witnesses that I typically
2 attempt to serve, I do live in a gated community.
3 That, coupled with the travel that I typically have 13
4 to 15 days a month, for the first time, I saw how easy
5 it was, if I chose to, to evade service under the
6 current rules. The additional options, including
7 using another means that is authorized by a court for
8 good cause and is reasonably calculated to give
9 notice, as stated in my papers, provides much-needed
10 flexibility, especially when it comes to serving
11 subpoenas on, again, these wealthy, tech-savvy
12 witnesses who rely on their technology platforms to
13 communicate, and while the Committee notes indicate
14 this option would not usually be the first option for
15 service, it still is useful in addition to Rule 45
16 when regular service methods most often effectuated by
17 a process server fails.

18 The public comment indicates opposition from
19 the process server regarding these additional methods.
20 These concerns are somewhat misplaced. First, the
21 current rule does not require use of process server,
22 but firms regularly do use these process servers as a
23 business model because it just makes sense because
24 it's fast, efficient, and affordable. The model will
25 continue to make sense if the proposed amendment are

1 adopted. Repeated attempts to serve cost both time
2 and money, which especially is detrimental to
3 plaintiffs-side practicing attorneys working on a
4 contingency-fee basis.

5 The next thing is AAJ supports the proposed
6 revision to Rule 45(b)(1)(B), which provide an
7 alternative for tendering witnesses fees at the time
8 and place that the witness is to appear rather than
9 only at the time of service. The current option for
10 tendering fees is, quite frankly, impractical given
11 the modern method of subpoena delivery, especially
12 since it is not possible for process or postal
13 services or commercial carriers to tender fees as part
14 of their delivery services and doing so would likely
15 lead to confusion or unnecessary disagreement over
16 whether the fees have been delivered.

17 In the age of electronic payment and
18 corresponding electronic recordkeeping of such
19 payments, it makes significantly more sense to provide
20 a more feasible option that ensures that the witness
21 receives the fee. So AAJ does recommend moving the
22 phrase "unless the court orders otherwise" to the end
23 of the sentence or at least to the beginning of the
24 sentence for ease of understanding.

25 Now, just a few minutes ago, there was a

1 question asked about the service of 30(b)(6)
2 witnesses, and I'd like to touch on that point because
3 AAJ does have two primary concerns with the proposed
4 amendment text.

5 First, subsection (b)(1)(i) is drafted in a
6 somewhat confusing matter. What exactly does it mean
7 to serve a named person personally when serving a
8 30(b)(6) witness? The specific person is for the
9 corporation to identify, so the proposed wording seems
10 inadequate to accomplish that. The Style Consultant's
11 interpretation that subsection (b)(1)(i) carries
12 through to the subsections is not supported by the
13 plain language or meaning of the statutory
14 construction, which uses the word "or," signaling that
15 each subsection operates independently on its own, is
16 a separate option.

17 One way to solve this problem is to add
18 another subsection to the list providing for service
19 by an authorized agent, similar to the language in
20 Rule 4(e)(2)(C). That language would essentially say
21 delivering a copy to an agent authorized by employment
22 or by law to receive service of process. This
23 language would also alleviate the potential problem of
24 misinterpretation resulting from importing some of the
25 rule but not all of it.

1 A second way this issue can be addressed is
2 to ensure that all options in the proposed rule
3 address the issue of persons who evade service. One
4 recommendation is to provide that the subpoena can be
5 left with a person of suitable age and discretion even
6 if the person does not reside at that particular
7 dwelling. Common examples include property managers,
8 nannies, housekeepers.

9 In the lawsuit that I mentioned earlier that
10 I was a defendant in, I had the opportunity with, and
11 believe me, I love my mother-in-law, but, fortunately,
12 she does not live with us, and there were a few of
13 these occasions when subpoenas could come where she
14 was the one who opened the door to accept it or to be
15 presented with it. She is certainly someone who
16 should be able to accept a subpoena in this situation,
17 but under the current rules, that's not possible. And
18 so, while the people who are employed in these
19 occupations often live on their employees' property,
20 or family members, these are all situations where,
21 indeed, the rule change would be able to help more
22 efficiently effectuate service.

23 Finally, AAJ does recommend adding some
24 additional language to the Committee note regarding
25 the additional methods of service. Specifically, AAJ

1 recommends adding a sentence about flexibility and
2 technology as a prompt to the courts that the rule
3 contemplates electronic service for individuals with a
4 known social media presence who may be able to evade
5 service. Some of that key language includes adding in
6 that section, such as evasion of service, and as
7 indicated in my papers, adding a sentence saying that
8 the rule is intended to be flexible and accommodate
9 electronic means of service and new technologies.

10 So, in conclusion, AAJ definitely supports
11 the proposed Rule 45(b) amendments and believes that
12 some further refinements would ensure that the
13 amendments are easily able to be understandable and
14 implemented by both parties and the courts. These
15 amendments should save time, resources for parties
16 serving hard-to-locate persons, in some cases, persons
17 such as myself. Thank you.

18 CHAIR VANCE: All right. Questions? Thank
19 you, Mr. Ward. Questions for Mr. Ward? I have a
20 question. On this 30(b)(6) issue, I'm trying to
21 understand what exactly the issue is because now the
22 rule says delivery on the person, and Rule 30(b)(6)
23 says that you subpoena the corporation and the
24 corporation names the person. In our local subpoena
25 forms, that's how it's set up, where you serve the

1 corporation and the corporation designates the
2 individual. So you're not subpoenaing individuals as
3 30(b)(6) witnesses, you subpoena the corporation. So
4 how do you do that now? I mean, how do you serve that
5 subpoena now?

6 MR. WARD: Well, as a practical matter, this
7 issue oftentimes is handled because the parties are
8 able to work through it because, depending on the
9 different topics that a 30(b)(6) witness is requested,
10 it's upon the defendant to identify what witness would
11 be the person that is appropriate for that 30(b)(6)
12 deposition, and so there's cooperation typically that
13 the parties have going back and forth with each other
14 in order to not only identify but also identifying and
15 being able to accept that type of service.

16 But, when you don't have that type of
17 cooperation, we would have to have some ability to be
18 able to efficiently serve a 30(b)(6) witness, and
19 being able to have a manner that expressly addresses a
20 company, expressly addresses a company through the
21 means of, again, a registered agent or someone such as
22 that is necessary in order to be able to get that
23 service completed for that type of witness.

24 CHAIR VANCE: My next question goes to that.
25 You propose as an option adding a provision to the

1 rule to authorize service on an agent designated for
2 service of process. If that were deemed to be a
3 substantive change to the Committee proposal requiring
4 republication and another comment period, would you
5 still want to recommend that?

6 MR. WARD: Yes, I would because, again,
7 there are so many different, I guess, scenarios that
8 could, more than what we've talked about today, that
9 could be in play here, and I think that that would be
10 able to allow to cover many of these different
11 situations that we're facing, that we face in your
12 question.

13 CHAIR VANCE: Okay. Rick Marcus?

14 PROF. MARCUS: Mr. Ward, good to see you.

15 MR. WARD: Good to see you as well.

16 PROF. MARCUS: As usual, you're helping us
17 out here. I want to make sure I understand one thing
18 you said and then ask about something that isn't
19 really on our current plate. The thing I think you
20 said regarding Rule 45(b)(1)(A) is that you think
21 there should be an "or" after each of the Romanettes
22 and we don't have an "or." It strikes me that it
23 should be fairly clear to a reader, I thought, that
24 these are alternatives. You don't have to do all of
25 them in order to effect proper service. So am I

1 misunderstanding your comment there? That's what's on
2 our plate now.

3 What's not on our plate presently in this
4 package is Rule 43, although some people have said
5 things about it. You mentioned hearings. I note that
6 Rule 43 deals with those, it seems, in Rule 43(c)
7 motion proceedings, not Rule 43(a), trial testimony.
8 I wonder if you could tell us about your experience
9 with remote testimony in motion proceedings.

10 So one is the question of adding an "or,"
11 which we don't currently have in the service
12 provision, and the other is looking to the future, how
13 about remote testimony at hearings?

14 MR. WARD: Yeah. So, to answer your first
15 question, adding the "or," one of the most frustrating
16 things that many of us face is reasonable, in some
17 instances, unreasonable misinterpretation of various
18 different rules and/or statutes. Being able to add
19 the "or," I think, gives the best clarity that a court
20 and/or the parties would be able to have when looking
21 at that particular section as a whole in order to make
22 sure that all sides understand, to your point, that
23 either of these are options, and so that is one of the
24 reasons for being able to add the "or" in.

25 And as it relates to remote hearings, you

1 know, again, those are more often now than ever
2 before. I was supposed to have been headed to Chicago
3 for a hearing this week, and, fortunately, because of
4 the ability to have remote hearings and the weather
5 that everyone has experienced or faced over the last
6 few days, it's been moved from in person to remote,
7 and so we have done this quite often with this
8 particular court, not to mention with many others, and
9 it acts as a very feasible, cost-effective, and, in
10 some instances, necessary means to be able to continue
11 moving a case forward and handle issues or address
12 issues that need addressing sooner than later, having
13 that option to be able to have remote hearings and
14 other remote testimony that we've talked about today.

15 CHAIR VANCE: Andrew? Thank you. Andrew?

16 PROF. BRADT: Yes. Thank you very much.
17 This has been very helpful. I wanted to just return
18 to something that you mentioned early on. As you
19 noted, we've received some concerns from the process
20 server industry, and you suggested that even if the
21 rule is amended, using a process server is often an
22 efficient and attractive option. I wonder if you
23 could elaborate a little bit as to why you think
24 that's the case.

25 MR. WARD: Well, you know, being able to

1 hire -- I think both plaintiff and defense firms use
2 process servers. It is part of the business model to
3 be able to have a process server be, in many cases,
4 the first choice. Many times, you may have, a law
5 firm may very well have a contract with a particular
6 service agent and it's just, for people that you can
7 easily serve, it just makes sense to be able to
8 utilize that.

9 This rule does not affect -- our proposed
10 changes does not affect that ability for any law firm
11 to be able to use that as the first, second, or last
12 choice in whatever method that they choose to use.
13 And so any of the commenting or pushback as it relates
14 to that particular industry I think is misplaced
15 because, again, the proposed rule changes do not
16 affect the ability to utilize that as a method for
17 service.

18 CHAIR VANCE: All right.

19 PROF. MARCUS: Could I follow up on that,
20 Judge Vance?

21 CHAIR VANCE: Sure.

22 PROF. MARCUS: Just following up on that,
23 one of the things we've been told is that removing the
24 requirement that the witness fee be tendered at the
25 time of service of the subpoena will raise a risk for

1 non-party witnesses that they'll be asked to show up
2 and at risk that they won't actually be paid travel
3 and the witness fee as the rule and statute direct.
4 I'm wondering. It strikes me that somebody who serves
5 a subpoena wants that witness to show up and will want
6 to help out in any way that would be helpful. Am I
7 misunderstanding what lawyers are trying to do when
8 they serve subpoenas?

9 MR. WARD: No, I mean, you know, I think you
10 are spot on, but there oftentimes are again fees that
11 are associated with the subpoenas, and, again, I think
12 what is good for this proposed revision allows for,
13 just simply allows for those fees to be more
14 effectively provided because we do want to make sure
15 that those fees are paid. We want to make sure that
16 there are no impediments to being able to pay that,
17 and so we definitely support -- the AAJ in general
18 supports this particular revision, and it's just a
19 matter of being able to move that phrase, "unless the
20 court orders otherwise," to the end of the sentence,
21 again, to make it more easily understandable from all
22 parties regarding this particular issue of tendering
23 fees.

24 CHAIR VANCE: All right, Mr. Ward, thank you
25 so very much for your helpful comments and answering

1 our questions.

2 We're going to move on to Mr. Fleischman.
3 Steven Fleischman, you're up. You may proceed.

4 MR. FLEISCHMAN: Good morning. Thank you
5 for letting me testify. I'm Steve Fleischman. I'm a
6 partner with Horvitz & Levy in Los Angeles. I was
7 counsel of record in the Kirkland case, so if you want
8 to blame all of this on me, you can, although I
9 believe in my heart of hearts the Kirkland case was
10 correctly decided and should not be overturned by
11 rule. I'm speaking against the amendments to Rule
12 45(c). There's three points I want to make.

13 Number one, this really is sort of a
14 solution in search of a problem. We have videotape
15 testimony. It plays. It works during trial. Are
16 there pros and cons in any given case between
17 videotape testimony and Zoom testimony? Sure. I
18 think reasonable people can disagree on that. But, if
19 you go back and look at the original letter from the
20 Hagens Berman firm, they really want to dramatically
21 change Rule 43 to allow remote testimony in virtually
22 all cases, and I would be opposed to that. I think
23 the Committee was correct, I think, in 1993 in Rule 43
24 when it said there should be a strong preference for
25 live testimony, and their proposed amendment to Rule

1 43 would virtually eliminate that discretion.

2 In terms of the 2013 amendment regarding
3 nationwide service of subpoenas, that was largely a
4 procedural matter. It used to be, if you had a case
5 in Chicago and you needed to serve a subpoena on a
6 witness in Los Angeles for a deposition, you had to
7 open a miscellaneous action in the federal court in
8 Los Angeles, get a case number, put that on the
9 subpoena that would issue from the federal court in
10 Los Angeles and serve that subpoena. That was
11 eliminated with the nationwide service of process so
12 that the subpoena would now issue from the Chicago
13 court, but that amendment was never intended to make
14 it nationwide scope of the subpoena power insofar as
15 the Committee kept the geographical limitations.

16 And Kirkland correctly held and I don't
17 think anyone disputes a federal court in Chicago could
18 not compel physical appearance for trial testimony in
19 Chicago of someone that resides in California. That
20 was never the intent. I've also heard, well,
21 California is a large state and you can compel people
22 from far away to appear. I mean, yes and no. If you
23 look at 45(c)(1)(B), that's limited to a party or
24 where the non-party would not incur substantial
25 expense, so if you want to subpoena somebody from San

1 Francisco to appear in L.A., is that possible? Yes,
2 but then you get into the court has discretion to
3 determine what's substantial expense.

4 The second point I want to make is about
5 burden. The Committee seems to have focused entirely
6 on the differences in burden between testifying in
7 person and testifying remotely, that is, the mechanism
8 of testimony being given. That is certainly one type
9 of burden, but the other type of burden that does not
10 appear to have been considered is the burden on
11 particularly non-parties having to testify yet again
12 at trial after they were deposed.

13 If you look at the Kirkland case, my clients
14 flew from the Virgin Islands to Los Angeles to be
15 deposed. They flew to Los Angeles a second time to
16 testify in the third phase of the trial. And now they
17 were being asked to give testimony a third time in
18 that case. It's easy to imagine in MDL litigation how
19 a non-party retired witness who has no interest in the
20 case could be compelled to testify multiple times by
21 Zoom and every time he or she would have to retain an
22 attorney to ask the court to exercise discretion to
23 quash the subpoena.

24 The final point I want to make is about
25 unavailability. If this amendment goes through, the

1 Committee would have virtually eliminated the concept
2 of a witness being unavailable at least based on
3 geography. Obviously, you would still have issues
4 with illness and things like that, but that causes
5 issues with other rules, particularly Rule 32 and Rule
6 of Evidence, I think it's 804. And I thought I saw in
7 the Committee's prior deliberations that there was
8 going to be a comment in the rule about
9 unavailability, but I didn't see it in the final
10 draft. So I'd urge the Committee not to adopt these
11 changes, and with that, you know, if anyone has
12 questions, I'm happy to answer them.

13 CHAIR VANCE: Are there questions? Andrew?

14 PROF. BRADT: Yes. Thank you very much.
15 This is very helpful. I guess I'm confused by a
16 little bit of the testimony. It sounded to me like
17 you think that one thing that's important when we
18 think about remote testimony is to ensure that there's
19 a preference for live testimony, and yet, at the same
20 time, you seem to indicate that, well, so long as a
21 person has been deposed, then that preference for live
22 testimony goes away, and I'm not quite sure how those
23 two things square. If the preference for live
24 testimony is to allow the jurors to judge a witness's
25 credibility, why should that go away?

1 MR. FLEISCHMAN: I'm sorry, I lost the last
2 10 seconds or so of what you said.

3 CHAIR VANCE: You're muted. We can't hear
4 you.

5 PROF. BRADT: The question was, if you have
6 a preference for live testimony so the jurors can
7 judge the witness, why does that go away if the
8 witness has already been deposed?

9 MR. FLEISCHMAN: Well, I meant to say live
10 in-person testimony, so now you're balancing the
11 difference --

12 PROF. BRADT: Okay. It's still the same
13 thing.

14 MR. FLEISCHMAN: But you're balancing the
15 difference between video testimony or video testimony
16 by Zoom. In any given case, there could be pros and
17 cons. If you served a subpoena on my mother to appear
18 by Zoom testimony, good luck getting her on the
19 computer and having it work properly as opposed to
20 playing her videotaped deposition. My mother's not
21 all that electronically capable. So, in any given
22 case, it could go either way depending on the witness,
23 but videotape testimonies have been used for a long
24 time and they work well, and I think, if you ask 10
25 judges about their preference between the two, you

1 might get 11 or 12 answers to that.

2 In any given case, there are pros and there
3 are cons, and when you get to Rule 43, I would
4 encourage the Committee to keep strong discretion with
5 the court and reject the proposal regarding Rule 43,
6 which would virtually eliminate that discretion. But,
7 I mean, the other answer to your question is I think a
8 jury can tell when a witness is being evasive by
9 watching videotaped deposition, and they can tell when
10 a witness is being evasive if they're doing it live by
11 Zoom. Is one better than the other? I think
12 reasonable people can agree or disagree on that.

13 CHAIR VANCE: Rick Marcus?

14 PROF. MARCUS: I think I'm following up on
15 Andrew's question concerning video versus -- live
16 remote testimony if you want to call it that versus
17 video testimony. You say that -- I gather you say --
18 this is not on our plate now. I'm just asking a
19 question for the future, that removing the "compelling
20 circumstances" prerequisite for the giving of remote
21 trial testimony would remove the court's discretion.
22 Some say, well, that really limits the court's
23 discretion because that's such a strict standard.
24 What do you have to say about that?

25 MR. FLEISCHMAN: Well, I don't have it in

1 front of me, but I think the thrust of the Hagens
2 Berman letter and proposal was, even if the witness is
3 traditionally unavailable, they should be able to
4 compel their testimony live. Or I'm sorry. The fact
5 that the witness is available and could appear in
6 court is not a factor the District Court should
7 consider, and I don't agree with that. That just
8 means every witness, particularly expert witnesses,
9 are just going to show up by Zoom because it's easier.
10 I don't see a lot of criticism regarding the current
11 practice of giving trial courts discretion.

12 I mean, look, if a witness has a medical
13 issue or a family emergency comes up, I trust our
14 trial courts to exercise their discretion to determine
15 if there's compelling circumstances to allow that
16 witness to testify remotely. That's separate and
17 apart from federal court subpoena power, which has,
18 you know, for almost a hundred years been limited
19 geographically.

20 CHAIR VANCE: I have a question. Mr.
21 Fleischman, you raised the issue of unavailability,
22 that this proposed change would have an impact on the
23 unavailability rules under 32(a) and Evidence Rule
24 804(b)(1). There are courts that don't agree with
25 Kirkland, and so my question is, in the courts that

1 don't agree with Kirkland, have there been issues
2 arising as to these unavailability rules, as to the
3 impact on these unavailability rules?

4 MR. FLEISCHMAN: I'm not aware of any and
5 I'm not aware of any case that has disagreed with
6 Kirkland. I actually have a Westlaw notice set up
7 anytime Kirkland is cited, and I haven't seen any
8 criticism of it. I've seen some disputes about how
9 Kirkland applies to depositions, and I think that
10 needs to play out.

11 CHAIR VANCE: All right. Any further
12 questions for Mr. Fleischman?

13 (No response.)

14 CHAIR VANCE: Thank you, Mr. Fleischman.
15 Your testimony's been very helpful.

16 MR. FLEISCHMAN: Thank you.

17 CHAIR VANCE: All right. Next up is
18 Professor Brian Fitzpatrick.

19 PROF. FITZPATRICK: Judge, thank you so much
20 for allowing me to testify today. It's a real honor.
21 I wanted to express some misgivings about the rules
22 proposal to drop the requirement that litigants tender
23 the witness fees at the time they serve subpoenas, and
24 I just want to preference my remarks by, I hope,
25 reminding people that I am a big supporter of the

1 plaintiffs' bar, a big supporter of private
2 enforcement of the law. I wrote an entire book about
3 it, *The Conservative Case for Class Actions*, which I
4 hope you are familiar with. I believe very strongly
5 in harnessing the power, the energy, the incentives of
6 the plaintiffs' bar to hold defendants accountable
7 when they do wrong, so I am with AAJ 99 percent of the
8 time.

9 But, while we harness the power of
10 incentives and resources of the plaintiffs' bar, we
11 don't want to over-harness, and I think it's critical
12 that we have rules in place that give litigants the
13 right incentives on how they litigate cases, and I'm
14 worried that Rule 45 has drifted very, very far from
15 the original wisdom of the rulemakers, and the
16 original wisdom of the rulemakers was, if you're going
17 to haul an innocent non-party into your lawsuit, you
18 need to make them whole from the very beginning.

19 The original rules said you have to advance
20 the witness fees to these non-parties and, if they
21 need to go into documents, you need to advance the
22 costs of that as well. You need to make them whole
23 from the very get-go. They're innocent non-parties.
24 They shouldn't be subsidizing your litigation.

25 And we have drifted so far away from that.

1 Obviously, we don't require people to advance the
2 costs of document production anymore. In fact, we've
3 made it very difficult for non-parties to get
4 reimbursed for the expenses they have to incur to
5 produce documents, and now you're considering what I
6 consider to be the final nail in the coffin of the
7 original wisdom of this rule, which is to get rid of
8 the advancement of the witness fee as well. I think
9 we should be going in the exact opposite direction. I
10 think we should keep the advancement of the witness
11 fee and I think we need to add back the advancement of
12 the costs of document production.

13 If parties want to drag a non-party in, they
14 should advance the cost of whatever they're asking
15 them to do. Is that going to make litigation more
16 expensive for litigants? Absolutely, but that's the
17 point. The point is you shouldn't be externalizing
18 the costs of your case onto a non-party. And so I
19 would just really urge the Committee to just slow down
20 and not rush this change forward and think about
21 whether we are heading further in the wrong direction
22 and whether it might be time for innocent non-parties
23 to adopt the original understanding of this rule, re-
24 adopt the original understanding of this rule, and
25 that is to say advance the burdens that you're

1 imposing on other people. Thank you very much.

2 CHAIR VANCE: Thank you, Professor
3 Fitzpatrick.

4 Are there questions for Professor
5 Fitzpatrick? Yes, Rick Marcus?

6 PROF. MARCUS: Brian, thank you very much.
7 As usual, to the point and against a background of our
8 history. I have only a little question about
9 something that I think I also asked Mr. Ward about in
10 terms of tendering the fees. I thought he said yes,
11 he wants to do whatever he can to facilitate witness
12 attendance where a subpoena tells them they should
13 show up. The current rule does not address what you
14 would like to see about the costs of production of
15 documents, which may not require any travel, which may
16 be done electronically.

17 I'm wondering, do you disagree that at least
18 AAJ members would probably say yes, we want that
19 witness to show up and we're going to do everything we
20 can to help the witness get there, and if the witness
21 has a problem paying for transportation, we want to
22 help because I would think that's the incentive that
23 matters in terms of tendering the fees?

24 PROF. FITZPATRICK: That's a good question.
25 Professor Marcus, it's wonderful to see you again.

1 You know, I think it's a mistake to ask a law
2 professor a question about the practice of law, but I
3 will do my best to answer it by saying the following:
4 You know, I think that is kind of -- it sounds to me
5 like kind of a rosy picture of how litigation
6 proceeds. Oh, yeah, we want to help you in any way we
7 can, just tell us what it'll cost to get you there. I
8 worry that litigants will use the fact that a witness
9 hasn't shown up to, you know, seek some kind of
10 sanctions or what have you against those witnesses.

11 I mean, I was recently served with a
12 subpoena and no one tendered me any witness fees and
13 no one expressed any concern about how I would get to
14 the deposition, and so I'm a little doubtful of the
15 rosy picture that was painted there. But, hey,
16 listen, if every litigant is going to want the witness
17 there and bend over backwards and do whatever they can
18 to get them there, then there shouldn't be any issue
19 with requiring them to advance the witness fee. I
20 mean, this is only an issue if people are not going to
21 do it, as they didn't do it when they served me with
22 my subpoena the other day.

23 CHAIR VANCE: Andrew?

24 PROF. BRADT: Hi, Professor Fitzpatrick.

25 Thank you very much for being here. I'm interested in

1 the historical question. I know you submitted a
2 suggestion earlier this year, and I'm sorry, I don't
3 have it in front of me at the moment, but I wonder
4 whether you could point me toward the best piece of
5 evidence that the original intent of this part of the
6 rule covered the costs of locating and producing
7 documents? Is there something tangible that
8 demonstrates that scope of the rule? Thanks.

9 PROF. FITZPATRICK: So, yes. Professor
10 Bradt, it's great to see you again too. I would refer
11 you back to my letter that I submitted to the
12 Committee, and I quoted in the letter from the
13 original 1938 version of Federal Rule 45(b), and that
14 rule required the advancement by the person in whose
15 behalf the subpoena is issued of the reasonable cost
16 of producing the books, papers, or documents.

17 So, basically, the way the rule worked was
18 you had to advance the witness fee, and if there was
19 going to be some document production that was needed
20 in addition to that, the rule also said you had to
21 advance the costs of the production as well. And
22 that's just been lost. I don't think it was even
23 intentional. You know, as we reorganized this rule,
24 it got lost that you should advance the costs of the
25 production as well, and now we've created a scheme

1 where it's really the burden is on the innocent non-
2 party to come forward and demand reimbursement, and
3 it's very hard, as we know, especially if you're a big
4 company, to get those costs reimbursed, and it's very
5 expensive. Some of our big companies have entire
6 departments dedicated to complying with these non-
7 party subpoenas, and I just, I think we've lost touch
8 with what this rule was all about at least for non-
9 parties.

10 CHAIR VANCE: All right. Are there any
11 other questions from Professor Fitzpatrick?

12 (No response.)

13 CHAIR VANCE: Thank you, Professor
14 Fitzpatrick, for your very, very thoughtful comments.
15 Thank you very much.

16 PROF. FITZPATRICK: Thank you, Judge. Have
17 a great day, everyone.

18 CHAIR VANCE: You too.

19 All right. With that, we will break for
20 lunch and come back at 1:30 p.m. Eastern Time.

21 (Whereupon, at 12:32 p.m., the meeting in
22 the above-entitled matter was recessed, to reconvene
23 at 1:30 p.m. this same day, Tuesday, January 27,
24 2026.)

25 //

1 note that I think that it would be helpful. I know
2 the question was asked earlier about whether the term
3 "business organization" should be defined or at least
4 discussed in some reference in the Committee note to
5 make clear what is intended, and while I think that
6 there is a general sense of understanding about the
7 term, questions could rise in terms of situations
8 where you have joint ventures or other types of
9 different types of entities or informal types of
10 associations that are created between parties that
11 could be involved in litigation, and, therefore, I
12 think it would be beneficial to have some clarity.

13 The other major issue I think that could be
14 the source of confusion is the definition or the lack
15 of definition of "indirect." In the old rule, it was
16 very clear it was stock ownership. Now it's direct or
17 indirect ownership. That could be a very complex
18 issue, particularly as it relates to indirect
19 pertaining to the ability of a party to control the
20 outcome of or the operations of the company or -- I'm
21 sorry, is somebody having a problem hearing? I'm
22 hearing a noise.

23 The issue about is indirect related to the
24 ownership or the ability to impact or control the
25 entity that is a party, and I think that without those

1 definitions, there could be areas of confusion and
2 information that might not be provided that is
3 intended by this rule.

4 I'll also make a couple of additional
5 points. One is an ongoing issue where I think that
6 the Committee could consider and should consider
7 adding a statement in the Committee note to make it
8 clear that judges should, and I believe this is the
9 case, should do whatever they can to avoid situations
10 where they would be required to recuse.

11 This is a question, I think, of due process
12 and access to justice when judges' own stock in
13 entities that come before them and they're required to
14 recuse, and that means that judges that are available
15 to sit are not able to sit, and this happens in a way
16 in the courts of appeal, where we don't even know when
17 that happens. Obviously, it happens with the Supreme
18 Court when they recuse themselves, and it can be an
19 issue in District Courts.

20 The second issue related to that is
21 something that I think has been referenced earlier, is
22 that if the purpose of 7.1 is to assist the judge in
23 deciding when recusal is appropriate and necessary
24 both due to the federal statute but also due to the
25 appearance of potential impropriety or influence that

1 not having a requirement of disclosure of entities
2 that have a significant interest in the outcome of the
3 litigation could and I think will create situations
4 where third parties could look askance at the
5 operations of the courts if a judge does have an
6 interest, indirect interest, in the outcome of the
7 case through litigation funding.

8 I can stop here and respond to any
9 questions, or I can complete the other elements of my
10 planned testimony.

11 CHAIR VANCE: Why don't we see if there are
12 any questions on 7.1, and thank you for your
13 thoughtful testimony.

14 Are there any questions from anyone on Rule
15 7.1? I would just note that -- Andrew?

16 PROF. BRADT: No, no. Just thank you for
17 those helpful suggestions. I wonder. You suggest
18 that it would be helpful to define the term "business
19 organization." Certainly, one of the things that
20 we've attempted in the draft of the rule is to expand
21 the universe beyond corporations. I wonder if you
22 have any suggestions that you think would do a better
23 job of covering what you describe, joint ventures or
24 informal associations, other than -- what would you
25 add in order to make that clearer?

1 MR. LEVY: I think the intent and perhaps in
2 the note to make clear that "business organization" is
3 intended to encompass any, both formal as well as
4 informal, combination or activities related to the
5 conduct of business in connection with a matter, and,
6 obviously, there are limits to that in terms of who
7 could be a named party in the case, but there are
8 situations where different types of organizations are
9 included or at least named in litigation, and,
10 obviously, this is covering for-profit, seemingly for-
11 profit entities, but there could be situations where
12 nonprofits as well could be a party, and it would be
13 important for the judge to know any direct or indirect
14 involvement by other nonprofits or organization
15 ownership, so that's another issue that I would
16 suggest consideration of.

17 CHAIR VANCE: I was just going to comment as
18 to the requested addition to the notes about judges
19 avoiding situations that would require recusal.
20 Judges have a code of conduct that governs many
21 aspects of our day-to-day conduct, but I've not been
22 aware of the civil rules ever issuing prescriptive
23 advice like that to judges, and I don't know whether
24 the Reporters can comment on if that's something that
25 has been within the purview of civil rules.

1 MR. LEVY: Well, if I could just quickly
2 comment? There has been a concept of the duty to sit,
3 which is a concept for a judge.

4 CHAIR VANCE: I understand that.

5 MR. LEVY: Right, and this is not exactly
6 within that, but I think it is within the spirit of
7 it. A judge could either inadvertently or even
8 deliberately decide that she or he does not want to
9 hear matters involving certain entities simply by
10 owning stock in those companies, and I don't think
11 that would be appropriate. And this is an issue that
12 has not gotten a lot of attention. The RAND
13 Corporation did a study about 10 years ago on it or
14 actually eight years ago, and it is a potentially
15 significant problem where, you know, many judges are
16 excluded from considering matters involving specific
17 companies because they own stock.

18 CHAIR VANCE: Okay. You want to proceed
19 with the rest of your comments?

20 MR. LEVY: Sure. Thank you. So, on the
21 issue of the remote testimony topic and I'm covering
22 Rules 26 and 45(c)(2), the one kind of overriding
23 point is that I think judicial oversight should
24 precede the issuance of subpoenas that would involve
25 remote testimony because of the potential issues and

1 concerns related to the burden that would be involved
2 in a subpoena to a witness, particularly a non-party
3 witness, but it could also apply in a situation with a
4 corporate witness or a 30(b)(6) witness.

5 When you have a situation where a party or a
6 witness is lined up to testify and they're halfway
7 across the country and they're waiting to determine
8 whether they're going to be called to testify, then
9 you're going to have a situation where they're kind of
10 sitting, waiting, and the witness might not even be a
11 likely witness at whatever proceeding, but it's easy
12 to send them a subpoena under the new rule and,
13 therefore, they're going to have their day and their
14 world upended due to this situation.

15 And I also want to comment on an issue about
16 the impact of remote testimony versus live testimony.
17 I believe, and this is an issue I dealt with on the
18 Texas Supreme Court Advisory Committee when it
19 considered the exact same issue, and I believe that we
20 are still very early in the process of understanding
21 the impact of remote testimony and the jury or fact
22 finder's assessment of the credibility of witnesses
23 versus having them before them in the witness box in
24 the courtroom, and there are many situations that play
25 into that, demeanor and the body language and other

1 aspects, but there are also concerns about the issue
2 of what rules exist under this concept.

3 If I subpoena a witness to testify and he or
4 she is across the country, is it fair for me to assume
5 that they're going to have a computer and appear via
6 Zoom? Do I have to have a court reporter where
7 they're located, or does the court reporter stay with
8 me or in a third location? All of these issues could
9 be areas of dispute, could be problematic.

10 There is another issue which relates to this
11 as well as the issue of the subpoena power, and that
12 is, for non-parties in particular, where do they go to
13 adjudicate an issue related to their participation.
14 The witness will file an objection and then the
15 requesting party will file a motion. Presumably, that
16 motion to compel will be heard in the court where the
17 case is pending, and that means that the non-party
18 might be stuck with having to appear there. I don't
19 think the rule is actually clear on that point.

20 I also will point out, and I think you heard
21 earlier --

22 PROF. MARCUS: Mr. Levy?

23 MR. LEVY: Yes.

24 PROF. MARCUS: I'm sorry to interrupt, but
25 it seems to me that Rule 45(d)(3) says that the court

1 where compliance is required must quash or modify a
2 subpoena. Doesn't that answer your question?

3 MR. LEVY: Absolutely not, Professor Marcus,
4 because the compliance, is the compliance in the trial
5 court? I presume it would be. It certain --

6 CHAIR VANCE: Not if it's in the --

7 PROF. MARCUS: Well, then the transfer
8 provisions added in 2013 in 45(f) are unnecessary
9 because everything's got to be filed in the court
10 presiding over the -- I'm surprised by that.

11 MR. LEVY: That's the problem with the
12 national service problem, Professor Marcus, because
13 you're taking the local court out of the mix. You
14 know, a San Francisco court could subpoena me to
15 testify. I'm in Colorado now and I apologize for my
16 attire, but I could be required to testify, but the
17 subpoena comes from San Francisco and that's where the
18 case is pending. Maybe that's not what's intended,
19 but that should be clarified either in the rule or the
20 Committee notes because the existing rule contemplates
21 that you domesticate the subpoena on the individual
22 witness within the hundred miles of where they live.

23 And I do --

24 CHAIR VANCE: Any other questions?

25 MR. LEVY: Yeah, I did want to point out

1 real briefly that I don't think that this Committee
2 should seek to overturn the Kirkland result by way of
3 this rule. There are a lot of significant reasons I
4 think you heard as to why that decision had merit. It
5 is a policy question, and I think that overturning it
6 via a rule is a bit problematic.

7 CHAIR VANCE: All right. Are there any
8 questions? Yes, Andrew.

9 PROF. BRADT: I just wanted to get to the
10 period on that sentence. Why is it problematic?

11 MR. LEVY: Well, in terms of the -- I think
12 that that decision was a faithful reading of the text
13 in that Rule 43 talks about how testimony is presented
14 and, obviously, the question of whether a court can
15 compel it. We have an existing structure where, if
16 you have a witness that's outside the subpoena range
17 of the trial court, they can be deposed and their
18 testimony can be taken.

19 Obviously, this new structure definitely has
20 a problem with the unavailability of witness issue
21 that relates to the rules of evidence, and I'm not
22 sure how that gets solved, but if I'm a person and I
23 am a fact witness in a case and I am subpoenaed to
24 testify in a 10-day trial and I've got to organize my
25 life around that no matter where I am in the world or

1 in the country, that does place significant burdens on
2 me.

3 PROF. BRADT: I take your point on that, but
4 your concern is with the policy, not any
5 appropriateness of the rule being amended through this
6 process. That's not an illegitimate --

7 MR. LEVY: Well, right.

8 PROF. BRADT: That's your concern. It's a
9 policy concern.

10 MR. LEVY: Although I will suggest that
11 there could be a Rules Enabling Act issue to the
12 extent that it does create a much greater power over
13 the ability to compel testimony than currently exists,
14 and is that a substantive change or procedural?

15 CHAIR VANCE: Rick Marcus?

16 PROF. MARCUS: Mr. Levy, thank you again for
17 your help in this process, but if I may? I want to
18 ask you about something that I think came up before
19 the lunch break, and that is the question of costs of
20 compliance with a subpoena. Now Exxon's a big
21 company, and if it is served with a subpoena, document
22 subpoena, in regard to a litigation to which it is not
23 a party, how could Exxon determine what the cost of
24 complying would be up front if that were required to
25 be tendered before Exxon had to do anything?

1 MR. LEVY: Well, we do look at that issue
2 when we get third-party subpoenas. Let me clarify
3 where we are the third party, the non-party to the
4 case, and I shouldn't use the word third party. When
5 we are not a party to the proceeding and we receive
6 subpoenas, and we will make a determination. If we
7 think that there is significant burden and time
8 involved in gathering documents, we will raise that,
9 and through our experience, we can make pretty quick
10 assessments of what we think those costs will be,
11 including the cost of gathering the information and
12 reviewing it and providing it.

13 So it is definitely a process that can be
14 ascertained based upon our experience in doing this.
15 Obviously, if it ends up being more or less, we would
16 communicate with the requesting party after the fact,
17 but there is an understandable universe of what it
18 could be and likely will be.

19 CHAIR VANCE: All right. Any further
20 questions?

21 (No response.)

22 CHAIR VANCE: All right. Thank you very
23 much, Mr. Levy, for your comments.

24 MR. LEVY: Thank you.

25 CHAIR VANCE: Let's move to the next

1 witness, Matthew -- is it Moeller or Moeller?

2 MR. MOELLER: Moeller, Judge. Thank you.

3 CHAIR VANCE: Okay. You may proceed.

4 MR. MOELLER: Thank you, Judge, and thanks
5 to the members of the Committee for this opportunity
6 to speak. I'll be brief, kind of similar to what Mr.
7 Levy was just discussing. I just wanted to offer some
8 comments based on my perspective of representing folks
9 who are often served as non-parties with document
10 subpoenas. I practice where Judge Vance is, down in
11 New Orleans, and represent a lot of maritime entities
12 along the Gulf south, and we represent, you know,
13 folks all the way from very sophisticated vessel
14 owners and operators down to mom-and-pop marine
15 contractors.

16 And while some of these entities are very
17 profitable and lucrative, you know, some of the
18 recordkeeping is fairly traditional and fairly
19 antiquated and particularly when you get down to some
20 of the smaller entities that we represent, and what I
21 hear from all the time is the moaning and groaning
22 when we get hit with a subpoena about the costs of
23 compliance and not just, you know, copying costs that
24 I think aren't that relevant anymore because of
25 electronic storage, but it's really the costs to the

1 business. It's the cost of the people's time, it's
2 the impact on the business when they've got to take
3 three or four folks off of a project they're working
4 on to try to comply.

5 And I realize there are protections in the
6 rule. I think, under (d)(2), you know, all the way
7 down to (ii), where there's an order that, you know,
8 can protect the non-party from significant expense,
9 but to get to that order often requires, you know, can
10 sometimes require fairly extensive briefing and back-
11 and-forth with opposing counsel, and there's costs
12 there.

13 I guess, you know, what I've talked about
14 with other folks and what I think, you know, we might
15 want to see is some kind of affirmative compensatory
16 step by the requesting party, whether it's some kind
17 of agreed to amount of money. I mean, Mr. Levy was
18 just talking about an estimate, whether it's some kind
19 of estimate, but I think all of us would like to see
20 that, you know, potentially undertaken in terms of an
21 amendment to the rule to eliminate kind of the built-
22 in cost and time and expense of even having to deal
23 with potentially getting reimbursed.

24 You know, a recent example, I represent a
25 marine engineering firm in Texas. Just about a month

1 ago, we had a document subpoena. They had to take
2 three people at, you know, their commercial rate of
3 \$225 an hour off of projects they were working on and
4 spend four days complying with the subpoena. Now
5 Texas, I think it's 205(3)(f) of the Texas Rules of
6 Civil Procedure, does have mandatory reimbursement,
7 but, again, there's no affirmative step on the front
8 end and there's no way to really calculate, you know,
9 what's in that cost in terms of the hit to the
10 business and what, you know, the compensation should
11 be. So, again, I think --

12 PROF. MARCUS: Mr. Moeller?

13 MR. MOELLER: Yes.

14 PROF. MARCUS: I'm sorry to interrupt, but
15 could you elaborate on your example? So I think you
16 said three people at X dollars an hour and X was 200
17 and something.

18 MR. MOELLER: Yes. Yes, Professor Marcus.

19 PROF. MARCUS: So are you suggesting there
20 should be an up-front charge to the requesting party
21 before the responding party has to do anything? And
22 what as an order of magnitude would that have been in
23 that case?

24 MR. MOELLER: Well, that's a great point.
25 Yes, I do think we should move towards a concept of,

1 again, some kind of affirmative compensatory step.
2 What that looks like, you know, I haven't given a ton
3 of thought to, honestly, but I'll tell you, in moving
4 to the new Rule 30(b)(6), and my colleague and I were
5 just dealing with this issue, I really like the idea
6 of a meet-and-confer and dispensing with the written
7 objections because I find that the written objections
8 only slow things down and add to the time and expense.

9 So I don't know if for Rule 45 there could
10 be a similar meet-and-confer requirement and within
11 that meet-and-confer maybe an agreement as to some
12 kind of reasonable advance, and then the documents
13 could be produced and one side says no, we need more.
14 Okay. Well, we've got to talk about extra expense. I
15 really like the idea of moving away from the written
16 objections and getting straight to a mandatory meet-
17 and-confer to try to work out some of these issues.

18 PROF. MARCUS: I was involved in the most
19 recent revision of 30(b)(6). I'm glad to hear it's
20 working, but my off-the-cuff reaction to your
21 description of your Texas case is that your estimate
22 would be maybe more than \$10,000, maybe tens of
23 thousands of dollars of three days' time for these
24 three people who are paid more than \$200 an hour? Am
25 I wrong on that?

1 MR. MOELLER: Well, I don't think you're
2 necessarily wrong, but that's also why I'm not
3 prepared to sit here today and tell you that it's got
4 to be that way, but, you know, I think some kind of
5 happy medium in how we get there, you know, I'm not
6 sure, but, again, more of a -- I feel like the issue
7 in these situations is people. It's hard to get out
8 of the starting block. The requesting party wants the
9 documents. The producing party is concerned about
10 time and expense. Here come the written objections.
11 Now we're kind of in this situation where there's
12 going to be extra time and expense to get the ball
13 rolling for both sides.

14 I just feel like some kind of advance, some
15 kind of meet-and-confer requirement, some kind of,
16 again, you know, affirmative compensatory step on the
17 part of the producing party would speed up the process
18 and eliminate some of the time and expense. I can
19 tell you from the requesting point of view my clients
20 are always, almost always, more than willing to pay
21 reasonable sums of money for information that they
22 think is valuable in the prosecution or defense of the
23 case and we always, when we have the opportunity to do
24 that, like to do that so that ultimately we can show
25 the court, hey, this is what we've done to try to get

1 this issue home.

2 So, you know, those are generally my
3 comments. I offer those for the Committee's
4 consideration, but I do think the protections that are
5 afforded to non-parties in the current form of the
6 rule are insufficient. I do in terms of, you know,
7 the time and expense that it often takes to comply
8 and/or fight. So, if I tell a client, hey, we can
9 fight, but you may be out 10 grand paying me to
10 prepare some objections back and forth with opposing
11 counsel, potentially have to go before the judge, then
12 they almost always say, well, we're just going to go
13 ahead and comply and not worry about it.

14 But, again, there's a hit to the business
15 there that, as you alluded to, Professor Marcus, could
16 be substantial and in other ways can be hard to
17 calculate, but I do think, you know, the tightening up
18 of the procedure and some kind of affirmative step on
19 the front end to kind of get us out of the starting
20 block would be helpful.

21 CHAIR VANCE: Thank you very much.

22 Are there any questions?

23 (No response.)

24 CHAIR VANCE: Thank you for your thoughtful
25 and straightforward comments. We really appreciate

1 it. Thank you very much.

2 MR. MOELLER: Thank you, Judge Vance. I
3 appreciate the opportunity.

4 CHAIR VANCE: All right. Thank you.

5 All right. The next witness is Mary
6 Novacheck.

7 MS. NOVACHECK: Good afternoon. Thank you,
8 Your Honor. My name is Mary Novacheck. I'm a
9 senior --

10 CHAIR VANCE: I'm sorry, Ms. Novacheck.

11 MS. NOVACHECK: No, no. It's okay.

12 CHAIR VANCE: Sorry.

13 MS. NOVACHECK: It happens to me every time
14 and I have no problem with people trying to pronounce
15 that one. The accent is on the second syllable,
16 Novacheck. Thank you.

17 CHAIR VANCE: Okay.

18 MS. NOVACHECK: I'm a senior partner at the
19 law firm of Nelson Mullins Riley & Scarborough in
20 Minneapolis, Minnesota. I want to thank the Committee
21 for the opportunity to speak regarding amendments to
22 Federal Rule of Civil Procedure 45. The current
23 proposal would revise 45(b) to clarify service
24 requirements for subpoenas, but I am here to advocate
25 for an additional amendment that would require the

1 serving party to cover excessive costs and fees
2 imposed on non-parties in response to these subpoenas.

3 I was licensed in 1987. I have several
4 federal District Court licenses and pro hac vice
5 admissions where I have defended manufacturers of MDL-
6 type defendants, medical devices, pharmaceutical,
7 automotive, recreational products. I serve as their
8 discovery counsel in complex product liability
9 litigations. I've litigated several issues involving
10 Rule 45 subpoenas. I've been a member of the Lawyers
11 for Civil Justice for several years, and I have seen
12 firsthand the practical challenges faced by non-
13 parties who are brought in to complex product
14 liability litigation.

15 And at this moment, I think the Committee is
16 at a bit of a crossroads on Rule 45. I've been
17 listening, and I think some of the comments that I've
18 heard are right on point. There are challenges with
19 the non-party understanding what the subpoena language
20 is telling them. We know that 45(a)(1)(A)(iv)
21 requires the requesting party to set up the text of
22 Rule 45(d) and (e) in the subpoena. These are the
23 provisions that spell out the protections the rule
24 provides to the responding party, so the language of
25 subdivision (d) on costs is very important. That is

1 where the Committee can communicate directly to the
2 non-party.

3 I was thinking about this earlier. I don't
4 think there's another rule that communicates with the
5 non-party other than 45, and it's the only time we
6 have an opportunity to help them control their costs,
7 and let me tell you, for non-attorneys, Rule 45(d) is
8 not exactly user-friendly. Non-parties see it as
9 business disruption and unanticipated expense. I
10 think often of some of my clients, dealers,
11 particularly motor sports dealers and automotive
12 dealers, who don't always have lawyers on staff that
13 they don't have to pay to assist. They abhor hiring
14 outside counsel due to the expense, and these Rule 45
15 subpoenas can lead to unnecessary cost and confusion.

16 So let me give you an example. Product
17 liability and mass torts, as you know in dealing with
18 the MDL reform that you dealt with recently, are very
19 heated. Serving parties serve grossly overbroad Rule
20 45 requests for emails, especially when they are
21 unable to locate compromising emails in a
22 manufacturer's production. They treat the dealers,
23 they treat the sales representatives, the distributors
24 as part of the company, which they're not.

25 I was defending a medical device

1 manufacturer in Colorado in about 2012 to 2014 in a
2 multi-case mass tort involving a medical device
3 company. It was not an MDL, but when an independent
4 sales representative was served with a Rule 45
5 subpoena, it sought extensive ESI searches, including
6 keywording, keyword searches of her entire company's
7 files and emails. The language very closely matched
8 the extremely broad language served on my client.
9 That sales representative emailed the subpoena to the
10 court because the other side was unwilling to modify
11 it.

12 Magistrate Judge Craig Shaffer was handling
13 our cases. He called the parties in for an in-person
14 hearing, and when we appeared, Judge Shaffer didn't
15 even ask for argument. He simply looked at my
16 opponent, who was counsel for several plaintiffs, and
17 said, Mr. Smith, that's not actually the name, but,
18 Mr. Smith, when I saw the subpoena, I nearly fell out
19 of my chair. He quashed it. He allowed the
20 deposition in-person testimony, but he quashed the
21 document request because the language was so plainly
22 overbroad and offensive for that non-party to respond
23 to.

24 After I joined LCJ in 2016, I learned that
25 Judge Shaffer was a new member of the Rules Committee.

1 I know the judiciary misses him, and I recognize his
2 important contributions to moving the law forward.
3 Now how do we give non-parties practical access for
4 such quick judicial relief? The rule is very
5 complicated. It does not temper the serving party. I
6 sometimes wonder what a human factors engineer would
7 say about the language in Rule 45(d) and what it
8 communicates to a non party about their access to
9 relief from costs and burdens, so how do we quickly
10 get them to have an opportunity for resolution?

11 Well, we know we can communicate with them
12 through service of the subpoena, but nothing in Rule
13 45 presently relays the strength of the judiciary's
14 commitment to reducing unnecessary litigation
15 expenses. They don't know about Rule 1. They don't
16 know about Rule 26(b)(1). Forty-five does not cite or
17 tell the recipient about proportionality. Section
18 (d)(1) states that the serving party is required to
19 avoid undue burden and expense, but when an offensive
20 subpoena is served in hotly contested litigation, I
21 often find that they're unwilling to modify these
22 subpoenas. So how do we elevate that issue?

23 I know that LCJ submitted a comment
24 suggesting the addition of a section (B) to 45(d)(1)
25 that enhances the commitment to reimbursing the non-

1 party, and I endorse that language. However, I also
2 see an opportunity for even more specific language
3 directly to the non-party that they would receive in
4 the subpoena. It could state, for example, if
5 compliance with a subpoena would impose an excessive
6 cost or attorney's fees on a non-party, the non-party
7 may notify the serving party of the amount it is
8 willing to bear to comply with the subpoena, and the
9 non-party is not required to incur additional costs
10 pending agreement.

11 If agreement cannot be reached, the serving
12 party must move to enforce the subpoena and
13 demonstrate that the requested discovery is
14 proportional and that reimbursement is not
15 appropriate. That's not perfect language, but some
16 type of automatic provision that gives the non-party
17 more control over their costs would ensure that the
18 serving party focuses on what they need before they
19 serve it, and the serving parties need to tailor their
20 subpoenas much more closely to what the evidence
21 indicates is likely there.

22 I appreciate your time and consideration.
23 Please know that my testimony is offered to ensure
24 that non-parties have access to the proportionalized
25 standards the Committee has worked so hard to ensure.

1 Listening to Mr. Moeller's testimony, I too
2 testified before you on Rule 30(b)(6), and, Professor
3 Marcus, it's nice to hear that you're interested, but
4 I do think that that meet-and-confer requirement has
5 been helpful. It has helped me temper the perfection
6 that was previously requested, which is very similar
7 to Rule 45 subpoenas. If you receive a Rule 45
8 subpoena as a non-party and you do nothing to comply,
9 you are in big trouble. If you do what you think is
10 reasonable to comply but not all that's asked, you may
11 still well be in trouble. So I suggest a meet-and-
12 confer requirement would also be helpful. I don't
13 know if the Committee has any questions for me, but I
14 would love to hear from you.

15 CHAIR VANCE: All right. Thank you.

16 Are there any questions?

17 (No response.)

18 CHAIR VANCE: Hearing none, thank you very
19 much for your testimony. It's been very, very
20 helpful. Thank you.

21 MS. NOVACHECK: Thank you.

22 CHAIR VANCE: Our next witness is John
23 Southerland. Mr. Southerland, you're up.

24 MR. SOUTHERLAND: Thank you. I was trying
25 to adjust my camera and this big --

1 CHAIR VANCE: Can't hear you.

2 MR. SOUTHERLAND: How about now?

3 CHAIR VANCE: Still faint.

4 MR. SOUTHERLAND: Is this better?

5 CHAIR VANCE: Mildly. If other people are
6 having trouble hearing, would you indicate? I think
7 we have other people who have difficulty hearing you,
8 so can you adjust your microphone again, please?

9 MR. SOUTHERLAND: Okay. Is this better?

10 CHAIR VANCE: Can you speak again?

11 MR. SOUTHERLAND: How about now?

12 CHAIR VANCE: Not great.

13 MR. SOUTHERLAND: I'm not sure what the
14 issue with the microphone is.

15 CHAIR VANCE: We're really having difficulty
16 hearing you. Does anyone have a suggestion to help
17 with the sound?

18 MR. SOUTHERLAND: Let's see. Yeah, I'm
19 sorry, I picked the wrong day to have these issues
20 with the microphone.

21 JUDGE LAUCK: Can you just talk louder?

22 MR. SOUTHERLAND: Yep, I can talk as loud as
23 you need me to.

24 CHAIR VANCE: Okay. Are you as close to
25 your microphone as you can be?

1 MR. SOUTHERLAND: I am as close to the mic
2 as I can be. Yes, ma'am.

3 CHAIR VANCE: You're better standing up.

4 MR. SOUTHERLAND: I've got every microphone
5 in this conference room as close to me as I possibly
6 can have it. Is this better?

7 CHAIR VANCE: Okay. That's a little better,
8 so go ahead.

9 MR. SOUTHERLAND: Okay. And I'll make my
10 comments brief. I think that the Committee's heard a
11 lot of what I would have to say on the amendments to
12 45. I do thank you for hearing me out. I've
13 testified before the Committee before on Rule
14 30(b)(6), and I think that the Committee's work is
15 really valuable. I have specific concerns with some
16 of the proposed amendments that are currently being
17 made by the Committee as far as service and tender of
18 fees, but, overall, I think I echo a lot of the
19 comments from others that I believe the Committee is
20 missing an opportunity to further enforce the
21 guardrail to protect and alleviate burden on non-
22 parties, and most importantly being that the rule
23 continues to not have a provision for the
24 reimbursement of costs, fees, and expenses when a
25 party, a non-party, is asked to produce documents and

1 things for inspections.

2 It's a necessary component. I agree with
3 what Ms. Novacheck just said. I agree with what Mr.
4 Moeller just said. I've been practicing law for over
5 20 years now. I've had the pleasure to be able to
6 represent some of the largest companies in the
7 country. I've also had, for equal pleasure, to be
8 able to represent small businesses, colloquially what
9 you would call mom-and-pop businesses. Non-party
10 subpoenas on those types of entities, they don't
11 really mean non-party, can have serious burden, and
12 when there's not a guardrail that requires them to be
13 reimbursed for reasonable expenses and cost and time
14 that they're going to incur, that presents a great
15 burden on them and presents great confusion for them
16 on what they have to do in complying.

17 I would add in, much like some of the other
18 comments, I think we need a provision in here that
19 fully accounts that reasonable reimbursement of costs
20 and fees and expenses for complying are going to be
21 made. I think, Professor Marcus, you asked a question
22 earlier whether a non-party needs to do that, whether
23 that has to be done before the non-party does any
24 work. Certainly, that would be ideal, but I think
25 that the Committee could put in there that the

1 reimbursement has to come before compliance. That
2 way, at least there's going to be some certainty for
3 the non-party that they're going to be reimbursed for
4 what they've reasonably incurred or they don't have to
5 comply.

6 For the requesting party, I can assure you
7 that if the requesting party gets right up on the door
8 and they truly need the discovery and they know that
9 all they've got to do is reimburse reasonable costs
10 and expenses and then they get compliance, they're
11 going to do that, they're going to, absolutely.

12 The other issue that I wanted to bring up
13 and I don't believe -- I haven't heard everyone
14 testify today, but I've not heard any discussion of
15 privilege logging and what the burden is on non-
16 parties for that. I wanted to speak that for just a
17 minute.

18 Currently, the rule does require privilege
19 logging, but I can tell you that even in representing
20 parties, privilege logging itself can be a great,
21 great burden. If we're trying to look at the approach
22 and tailor the rule to create as little burden as
23 possible on non-parties, I believe the rule needs to
24 specifically allow a non-party to categorically log at
25 least initially, until there's been a presentation to

1 the court demonstrating a further need for more
2 information.

3 Categorical logging in that context is going
4 to alleviate that great burden on non-parties, and an
5 example that I can give you is in representing a small
6 business, a towing and recovery company client of
7 mine. I had a situation with them a couple of years
8 ago where they received a non-party subpoena and the
9 non-party subpoena asked them to go search for and
10 provide records of towing and recovery efforts that
11 they had made over a five-year period for customers
12 who were unrelated to the litigation. That obviously
13 in and of itself created a burden for them.

14 A lot of those records were not held by them
15 electronically. They were going to have search
16 through boxes. There was going to be burden and
17 expense on the front end regardless for them. But
18 then they looked at and they asked the question, well,
19 what about all this private information of these folks
20 that are in these records? And I said, well, we're
21 going to have to redact that. And they said, well,
22 who's going to do that?

23 Well, you can have someone in your office do
24 it if you feel comfortable, or you can have them do it
25 and then I'll have to review it, but one way or the

1 other we're going to have to protect that information
2 before it goes out. The law protects PII, and so the
3 cost and burden then of having to create -- and they
4 said, well, what about once we redact it, what else do
5 we have to do? And I say, well, then you're going to
6 have to log it as well. Well, how do we do that?
7 Well, we're going to have to log each record
8 individually because that's what the rule says. Well,
9 how much time is that going to take? Well, it's going
10 to take a lot of time.

11 All of those are significant burdens that
12 are placed on non-parties, and I believe that some of
13 those burdens can be alleviated with some minor
14 amendments to the rules. All right. Yes, sir.
15 Professor Marcus, you have a question, I think?

16 PROF. MARCUS: Well, if I may? I'm sorry to
17 interrupt, but I think this is about what you are
18 talking about. What crosses my mind is the expenses
19 of -- well, the effort involved in responding with an
20 effort to determine what's responsive. That's one
21 thing, and then, among those things, what may be
22 withheld on grounds of privilege or work product. At
23 least that second thing, I would assume, is an
24 attorney decision.

25 Are you saying that the requesting party

1 should have to compensate the producing party for the
2 attorney time involved in making that second decision?
3 And then going back to the first one, that is, the
4 effort to determine what's responsive and where to
5 find it, is how and when can anybody know that at the
6 time of service of the subpoena? I've heard these
7 things come up, and it seems to me it would be helpful
8 to elaborate a bit on that, which is why I interrupted
9 to ask.

10 MR. SOUTHERLAND: Yeah, no problem. It's a
11 great question and I heard you ask that same question
12 earlier and I think it's a great question. That's why
13 I think that you can help alleviate some of that if,
14 within the rule, instead of at the time of service,
15 it's prior to compliance, so the reimbursement is made
16 before because, especially when you're dealing with a
17 document request that does not require testimony, you
18 know, you can preface compliance with having the
19 reimbursement made before then.

20 And so that gives the party an opportunity,
21 the non-party, to look at this and put a little bit
22 more work into this, to look at what it's going to
23 take to comply and gain more clarity as to what those
24 expenses and costs are going to be, and then they
25 simply don't have to turn over the requested discovery

1 until they've been reimbursed for their reasonable
2 costs and expenses and fees, and then, of course, you
3 know, that brings in, that gives opportunity for the
4 requesting party to a non-party to discuss this during
5 the time of compliance.

6 The rule continues to have guardrails in
7 there for, if there is an ultimate dispute on it, we
8 can take that to the court and figure it out, but at
9 least at the time we would take it before them, we
10 would have narrowed the issues that need to be
11 addressed and we wouldn't be sitting in a situation
12 where nothing's been done at all. So I think that you
13 can help do that if you have the reimbursement prior
14 to compliance rather than prior to the service.

15 As far as, you know, reimbursing attorneys'
16 fees, I mean, the rule itself already allows for a
17 court to order an award of attorneys' fees for
18 unreasonable burden and unreasonable requests being
19 made if a subpoena's fought, so, yeah, I think there
20 are certain instances if the requesting party goes and
21 they serve an unreasonable request on a non-party, I
22 think it's absolutely within the non-party's purview
23 to go back and say, hey, you're asking me for a bunch
24 of privileged work product information or PII for
25 customers and consumers and that's going to require me

1 to have attorney time involved and I'm going to
2 request that you reimburse that as well.

3 I think that's absolutely fine in that
4 particular instance, and I do think that if you
5 specifically authorize categorical logging under the
6 rule, I think that you can also alleviate some of that
7 as well.

8 CHAIR VANCE: All right. If there are no
9 further questions, we'll move on to the next witness.
10 Thank you very much, Mr. Southerland.

11 MR. SOUTHERLAND: Hey, thank you, Judge
12 Vance. I appreciate the opportunity.

13 CHAIR VANCE: Our next witness is Tiega. Is
14 it Tiega Varlack?

15 MS. VARLACK: Good afternoon, Your Honors.

16 CHAIR VANCE: Good afternoon.

17 MS. VARLACK: Hello. My name is Tiega
18 Varlack, and I am a solo --

19 CHAIR VANCE: Tiega.

20 MS. VARLACK: Yes, thank you. Thank you for
21 allowing me to offer this testimony. I am a solo
22 practitioner here in northern California. I work in
23 courts across the state as well as in federal court
24 and was licensed to practice starting in 2006, and
25 then, before that, I was actually a student attorney

1 in Washington, D.C., working in the civil courts.

2 I am here to say that I appreciate the
3 Committee's proposal to amend Rule 45(c) to make it a
4 lot less complicated and easier for witnesses to
5 appear remotely.

6 My reading of Kirkland is that it was a
7 misinterpretation of the court's right and power to
8 have persons testify remotely from where they are, and
9 so my only suggestion to the rule would be to state
10 that instead of, for remote testimony, the place of
11 attendance for remote testimony is the location where
12 the person is commanded, I would say it's the location
13 where the person is to provide the remote testimony
14 because then that gives us a concrete place to apply
15 the limitations set forth in the rule of a hundred
16 miles.

17 As a solo practitioner, I have practical
18 realities working mostly on plaintiffs' work to bring
19 people to court. I have been in federal court before,
20 and I've had witnesses who were prisoners. I've had
21 witnesses who had mobility issues or just couldn't
22 afford to make it to court, and so sometimes,
23 especially when you're in a hearing or a trial and you
24 have to have the testimony, it can make or break the
25 outcome, and so it's important to have flexibility for

1 people who may not otherwise be able to make it to
2 court.

3 In California, we are a very large state,
4 and we have suffered from all kinds of weather
5 conditions, such as mudslides, earthquakes, fires, you
6 name it, we've experienced it, and that can sometimes
7 make it difficult for people to make it to court, so I
8 do believe that the rule as proposed makes sense and
9 it will actually help with efficiency.

10 With respect to some of the, I guess,
11 dangers that have come up during this hearing about
12 remote testimony being unreliable, I think that as
13 also a state court practitioner, where remote
14 testimony has been embraced, I think that it is up to
15 the lawyer to make sure that the witness is properly
16 equipped to give testimony that is not going to lose
17 connection or that will also be able to be understood
18 by both the judge and jury.

19 I know, practically speaking, one thing I do
20 when I'm doing remote depositions is I actually have
21 the witness take the laptop or the tablet and scan the
22 room so I can see that there's no one else there, and
23 I also have the witness show me their phone, which I
24 believe does help, you know, confirm to both myself
25 and my colleagues that, you know, they're not being

1 fed information or being improper. So that's 45(c).

2 With respect to 45(b), I too also, as
3 plaintiffs' counsel, usually am in charge of trying to
4 get people served, and whether it's a big corporation
5 or sometimes, you know, just a regular person, that
6 can be difficult if they know they're being served and
7 they're evading service, and so I appreciate the
8 proposed amendment, which would allow an authorized
9 person to accept service.

10 An example that I recently had was we were
11 trying to serve an employee of United Parcel Service.
12 They were behind a big metal gate in a rural part of
13 California, and I had to keep sending my server back,
14 but the actual security guard who was authorized to
15 accept the packages, finally, we just got him to take
16 the subpoena and then, after, you know, kind of back
17 and forth with the other counsel, it was deemed to
18 have been served. So I think that with this rule, it
19 will give us more flexibility to allow for service
20 when there is a dispute over who should be able to
21 receive the documents.

22 And I think also, with respect to, you know,
23 whether it's a spouse or a partner, like a nanny or
24 someone else having ostensible agency, that also would
25 allow for us to move the process forward because, as

1 plaintiffs' counsel, sometimes some of the hardest
2 things when you're trying to get a case off the ground
3 is getting everybody served.

4 CHAIR VANCE: All right. Thank you.

5 Are there any questions for Ms. Varlack?
6 Ms. Varlack, I have a question for you. You talked
7 about having witnesses who could not afford to appear,
8 and that brings me to the question of the witness fee.
9 I mean, in your experience, have there been witnesses
10 who could not afford the costs of travel without
11 reimbursement of the witness fee?

12 MS. VARLACK: Yes, definitely, especially
13 when you're doing civil rights cases or people who,
14 like, may already be indigent or trying to get back on
15 their feet. Some may be homeless. They do really
16 rely on that witness fee. I didn't write about it,
17 but I would like to offer the comment that, again,
18 when I have to foot the bill, I prefer the way the
19 proposal reads for us to have the option to pay when
20 the witness appears because, although I have had
21 problems with people before not having the money to
22 come, I think, as a solo, if I have, like, 10 people I
23 want to bring and I have to pay everybody at that
24 time, I'm either going to get a very big bill from my
25 process server or I'm coming out of pocket.

1 And we all understand as judges and
2 practitioners that a lot of times the witness might
3 not even end up testifying, so I think the better
4 practice is to give the attorney the option to pay the
5 fee when a witness appears.

6 CHAIR VANCE: All right. Any? Rick Marcus?

7 PROF. MARCUS: I think you mentioned
8 something that prompts a question when you talked
9 about people who are in jail or have disability or
10 mobility problems. One of the things not in our
11 current package but currently under study has to do
12 with the compelling circumstances limitation or
13 feature of remote trial testimony. Have you found
14 that that constrains judges in finding compelling
15 circumstances with people who are incarcerated or have
16 mobility problems, the sorts of things you were
17 talking about, or do judges treat that or treat those
18 circumstances as compelling?

19 MS. VARLACK: I haven't really been on that
20 side of it because most of the time when I've had this
21 experience, I've actually had counsel that's
22 cooperative, so we've kind of come to the judge
23 together and said, okay, well, this is the problem we
24 have with this particular witness. We would be able
25 to make a decision together that this person can

1 appear remotely, so I've never had to make the
2 application without it being stipulated to, but I
3 think that -- I don't think the judges should be
4 confined. I think it's a matter of running an
5 efficient courtroom and making -- to me, this is an
6 access-to-justice issue, so the more that we can help
7 both sides tell their stories in a way that it is
8 accessible to all I think only will make the process
9 more stronger, for lack of a better word, and to get
10 us a better outcome.

11 CHAIR VANCE: All right. Thank you very
12 much.

13 Are there any other questions?

14 (No response.)

15 CHAIR VANCE: Thank you very much for your
16 very helpful testimony.

17 MS. VARLACK: Thank you, everybody. Thank
18 you.

19 CHAIR VANCE: All right. We'll call our
20 last witness, Rachel Downey.

21 MS. DOWNEY: Good afternoon. Thank you for
22 the opportunity to testify today in support of the
23 proposed amendment to Rule 45(c). I recognize that I
24 am batting cleanup today at the end of a long day, so
25 I'll try to keep my comments short.

1 My name is Rachel Downey. I am a partner in
2 the law firm of Hagens, Berman, Sobol, Shapiro, which
3 specializes in national class action and complex
4 plaintiffs litigation. I contributed to the January
5 2024 proposal to amend Rule 45(c) as well as Rule 43,
6 and I have followed the Committee's work on this
7 matter over the last two years, so I'd first like to
8 just thank the Committee and particularly the members
9 of the Rule 43 and 45 subcommittee for their hard work
10 and diligence that culminated in the proposed
11 amendment.

12 I think it's worth a very brief look at the
13 history of the geographic limitations in Rule 45. The
14 hundred-mile rule originated in the Federal Judiciary
15 Act of 1793, and its purpose was to protect witnesses
16 from the burden and expense of long trips to a
17 courthouse. I'm not sure how many of you have
18 traveled more than a hundred miles by horse and buggy.
19 I can't say that I have, but I think it would make all
20 of us revisit our definitions of burden. So, in many
21 ways, the hundred-mile rule is an anachronism whose
22 original rationale really makes little sense in modern
23 litigation.

24 Judge Fallon of the Eastern District of
25 Louisiana once memorably described it as a hundred-

1 mile colonial leash that not only perpetuates obsolete
2 notions of fairness but inhibits the truth-seeking
3 purpose of litigation. So looking back at the 2013
4 amendments to Rule 45, which sought to allow for
5 nationwide service of subpoenas, that represented a
6 really long overdue re-examination of Rule 45's
7 geographic limits, and, respectfully, when Mr. I think
8 it was Fleischman testified earlier that the intent of
9 the 2013 amendments was not to allow for nationwide
10 service of a subpoena for remote testimony, that's
11 simply not true.

12 In the March 2012 minutes of the Civil Rules
13 Advisory Committee meeting, there's a statement from
14 the discovery subcommittee that was responding to a
15 letter from a Hawaii lawyer, and he stated very
16 clearly that, as revised, a Rule 45 subpoena is
17 "properly issued for the very purpose of compelling a
18 witness outside the trial court's subpoena power to
19 testify via Rule 43 contemporaneous transmission from
20 a place within the limits imposed by Rule 45," so, in
21 other words, from any location that was within a
22 hundred miles of the witness's home or workplace.

23 Unfortunately, while some federal courts did
24 interpret the amended version of Rule 45 in tandem
25 with Rule 43 in the manner that the Committee

1 intended, many did not, so when we submitted our
2 original proposal back in January of 2024, the
3 District Courts were almost perfectly split on this
4 question. Sometimes even within District Courts you
5 would see differing decisions on this issue, and then,
6 in July of 2023, the Ninth Circuit, recognizing how
7 this question had deeply divided District Courts and
8 that it was a question that was likely to evade
9 appellate review, it took the extraordinary step of
10 granting mandamus relief in In re Kirkland.

11 So Kirkland may have reached the wrong
12 conclusion on this, but in doing so, it invited,
13 pretty explicitly it invited the Committee to clarify
14 the text and the notes to Rules 43 and 45 that it
15 believe compelled its conclusion in that case, and
16 since Kirkland, we've seen the tides shift a little
17 bit towards the Kirkland viewpoint, but District
18 Courts have continued to split on this question, so it
19 really is, you know, right all over the map.

20 So, frankly, I have a hard time
21 understanding the opinion that's been expressed by a
22 few people today that the proposed changes to Rule 45
23 should be made either after or concurrently with
24 changes to Rule 43. I think the Committee properly
25 recognized that there was an urgent need for

1 clarification of Rule 45 in light of the division
2 among the courts, which has created costly
3 uncertainties for litigants. It's needlessly burdened
4 courts with time-consuming disputes, and I think the
5 proposed amendment accomplishes the purpose.

6 I also want to echo the point that was made
7 by Ms. Barnes and Mr. Millrood earlier that this is
8 hardly a sea change, the proposed amendment. I think
9 the majority of the criticism we've heard today and in
10 the comments filed on the proposed amendment have
11 really been directed not to the proposal at issue now
12 but to theoretical future changes to Rule 43, but this
13 amendment is not doing anything to alter the stringent
14 good cause and compelling circumstance requirement of
15 Rule 43.

16 I am strongly of the view that that standard
17 should be lowered, and then particularly in particular
18 the preference for deposition video as the default
19 alternative to live in-person testimony should be
20 fixed, and I have a million things that I could say on
21 that. I could speak for another hour addressing some
22 of the points made today, but I think that is a
23 conversation for another day, so thank you and I'm
24 happy to answer any questions from the Committee.

25 CHAIR VANCE: Thank you.

1 Any questions from the Committee? Okay.

2 Rick Marcus, go ahead.

3 PROF. MARCUS: Thank you very much, and I
4 think --

5 CHAIR VANCE: Rick, you're not able to --

6 PROF. MARCUS: Pardon? What?

7 CHAIR VANCE: You froze.

8 MS. DOWNEY: We lost you for a moment.

9 CHAIR VANCE: We didn't hear you.

10 PROF. MARCUS: Can you hear me?

11 CHAIR VANCE: Now we can.

12 PROF. MARCUS: Okay. Good. I've got two
13 questions prompted by your comments. One is do you
14 have examples of the compelling -- I'm talking about
15 the future issues, not necessarily the current ones,
16 future issue -- do you have examples of the compelling
17 circumstances requirement in 43(a) being a major
18 impediment to remote trial testimony in situations
19 where it should be allowed?

20 And also, one of the things we have heard is
21 that parties, maybe plaintiff-side parties, will serve
22 lots and lots of subpoenas to put people to lots and
23 lots of trouble. I wonder if you have a comment on
24 that. So one question is, does the compelling
25 circumstances limitation actually play out in real

1 cases to make life difficult where it should not? And
2 also, do you -- I'm trying to remember my other
3 question. Do you think that the -- now I'm forgetting
4 my second question, so let me -- oh, are there risks,
5 as we have been told, to permitting subpoenas to be
6 served nationwide and putting people to trouble
7 because perhaps lawyers don't really want to do that?

8 So those are the two things, compelling
9 circumstances as a limitation and overuse if unleashed
10 if you want to put it that way. Those are the two
11 things I'd like to hear from you about.

12 MS. DOWNEY: Sure, but, yeah, on your first
13 question whether the compelling circumstances piece of
14 the standards, I guess, specifically whether that is
15 has served as an impediment to allowing remote
16 testimony under Rule 43, oftentimes the court sort of
17 views the good cause and compelling circumstances with
18 the adequate safeguards standard from a more holistic
19 perspective. It's rarely broken up into just here's
20 what compelling circumstances are.

21 A few courts have articulated it a little
22 bit better, and I could provide separately, not off
23 the top of my head, unfortunately, but I could provide
24 citations to cases that have given a better
25 articulation with factors as to what that means, but I

1 think it remains a high bar, but I think, when you
2 have a significant witness whose testimony is
3 essential that a jury would benefit from seeing
4 testify live even if that live means via remote means,
5 I think it is one that can be met.

6 I would like to see that lowered more so to
7 allow more witnesses to have the option of testifying
8 via remote means as opposed to being compelled to
9 present that testimony through deposition video. I've
10 seen firsthand how boring deposition video is for
11 jurors, and I have been responsible in many a case for
12 overseeing the deposition designation process and
13 dealing with the objections. It is a months' long
14 process, it is incredibly burdensome, and it's an
15 inefficient exercise for both litigants and the courts
16 when we have the ability to present testimony live by
17 Zoom.

18 As to your second question on the ability to
19 serve subpoenas nationwide, I take it you're asking
20 this would be in the case of trial testimony remotely,
21 but I guess I can't -- we've been serving subpoenas
22 nationwide for depositions for ages, so I don't think
23 it's anything new here in terms of I think we know how
24 to handle these. I don't think it's creating some new
25 form of mischief, you know, for subpoenaed witnesses.

1 CHAIR VANCE: I have a question to follow up
2 on that. I think the suggestion was that people would
3 serve subpoenas for remote testimony without first
4 having had a court determination under 43(a) that it
5 was permitted, and I guess my question would be, are
6 you seeing that happen?

7 MS. DOWNEY: I don't. I think, in most
8 cases, parties would obtain the Rule 43 order before
9 issuing a subpoena for remote testimony. I think that
10 in the ordinary course, and that would be the
11 preference, is to secure the Rule 43 order first and
12 then serve the subpoena. I think, as a practical
13 matter, sometimes that's just not possible just given
14 how the timeline's just before trial.

15 So just in the interest of efficiency to get
16 a subpoena out the door, I know, in the past, my
17 office has served subpoenas for remote testimony and
18 stated on that document that it was contingent upon
19 entry of a Rule 43 order from the court and that a
20 motion had been filed but had not yet been ruled on,
21 and I think, if that is necessary to proceed in that
22 manner and serve them simultaneously or even the
23 subpoena before the Rule 43 order, I don't think that
24 is problematic in any way. It would simply have no
25 effect if there were not a Rule 43 order.

1 CHAIR VANCE: Do you think the disclosure
2 requirement under Rule 26 will help push that
3 determination earlier in the case?

4 MS. DOWNEY: I do.

5 CHAIR VANCE: Rule 43(a).

6 MS. DOWNEY: I do, yes.

7 CHAIR VANCE: Okay. One other question, and
8 this is interesting because we keep having people tell
9 us, well, if we have Zoom live remote testimony, it's
10 going to save the judge from answering all these
11 questions about deposition designations, and I was
12 wondering if your experience, because it's been mine,
13 that at trial, a lot of times people don't make the
14 objections they would have made at a deposition for
15 whatever reason. They don't want to look obstructive.

16 You know, they know that the objection is
17 not really great and so, for that reason, some judges
18 don't rule on objections ahead of time because they
19 know they're going to evaporate if the witness is just
20 called at trial. And so I guess my question is, when
21 you call these witnesses remotely by Zoom, is there a
22 lot of interruption with objections during the
23 testimony of the witness?

24 MS. DOWNEY: No, I don't, and I think it's
25 largely identical to what you'd see with a live in-

1 person witness, and I think you avoid this whole
2 process, and I completely agree with you, this process
3 of deposition designations, I think we tend to -- on
4 both sides, right? Plaintiffs and defendants tend to
5 grossly over-designate from depositions, grossly over-
6 object to each other's designated portions, and then
7 spend hours and hours in the exchange process
8 negotiating objections.

9 Oftentimes, in our cases, we rarely have
10 these resolved before trial. So we actually have to
11 agree on stipulations for exchanging the final cuts of
12 designations a few days before we plan to present them
13 in the courtroom, and we have to process for
14 renegotiating the final objections, presenting them to
15 the court, having the court rule on those objections,
16 and only then can we create the final video cuts for
17 presentation to the jury. So it is a lot of work, and
18 all that could be avoided if we could more easily
19 present witnesses remotely.

20 CHAIR VANCE: All right. Thank you.

21 Are there any other questions for Ms.
22 Downey?

23 (No response.)

24 CHAIR VANCE: Ms. Downey, thank you so very
25 much for your helpful testimony.

1 MS. DOWNEY: Thank you.

2 CHAIR VANCE: All right. And Ms. Downey is
3 our last witness, so this concludes today's hearing,
4 but before we do, I want to thank on behalf of the
5 Committee Carolyn Dubay, Shelly Cox, and Sarah Sraders
6 for their help in organizing today's hearing and
7 making it happen. We really, really appreciate it,
8 and I know I can tell you personally I could not have
9 lived without you.

10 I also want to thank the witnesses and
11 observers and those who have submitted comments for
12 their interest and contributions to the rules process.
13 The testimony and comments are incredibly helpful to
14 the Committee's deliberations, and I want to remind
15 everybody once again that the comment period does not
16 close until February 16, and we welcome additional
17 comments.

18 And, finally, I want to thank all of our
19 Committee members who have appeared today. We thank
20 you very much for being here and for participating.

21 And with that, have the rest of a nice day,
22 and we are adjourned.

23 (Whereupon, at 2:43 p.m., the meeting in the
24 above-entitled matter was adjourned.)

25 //

REPORTER'S CERTIFICATE

DOCKET NO.: N/A
CASE TITLE: Meeting of the Advisory Committee on
Civil Rules Re: Proposed Amendments to
the Federal Rules of Civil Procedure
HEARING DATE: January 27, 2026
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Administrative Office of the U.S. Courts.

Date: January 27, 2026



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