VANDERBILT
Law School

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Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Via email: RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Amendment to Rule of Civil Procedure 45

Dear Committee:

I am writing to ask you to consider amending Rule of Civil Procedure 45. The current Rule requires nonparties to foot the bill for expensive document requests and the like from plaintiffs and defendants. This is neither just nor efficient. Whatever justification there might be to saddle an adverse litigant with the expense of your production requests, there is none whatsoever to saddle a third party with it. Moreover, it is Economics 101 that people who do not pay for something will consume too much of it; experience has shown that production requests of nonparties are no different. *See, e.g., The Sedona Conference Commentary on Non-Party Production and Rule 45 Subpoenas*, 9 Sedona Conf. J. 197 (2008). The Rule should be amended to make nonparties whole when they respond to production requests from litigants.

Indeed, I wonder if this might have been the original design of Rule 45 and it was lost to technological advancement and inertia. Unlike the Rules to take discovery from parties, Rule 45 has always required litigants to pay nonparties' costs to appear in person to testify. *See* Fed. R. Civ. P. 45(c) (1938) ("Service of a subpoena upon a person named therein shall be made by . . . tendering to him the fees for one day's attendance and the mileage allowed by law."); Fed. R. Civ. P. 45(b) (same). I suspect this generally made nonparties whole back in 1938. The Rule was built upon the preexisting practices of subpoenas *ad testificandum* and *duces tectum*. *See* Advisory Committee Notes to Fed. R. Civ. P. 45 (1938). The first required a witness to appear to testify; the second required a witness to appear with documents: it literally means "appear and bring with you." I gather witnesses usually produced documents back then by showing up with them in person. *See* George Ragland, Discovery Before Trial 184-88 (1932) (canvassing the document production devices upon which the Federal Rules were built, including subpoena *duces tectum*). This would have enabled nonparties to collect from requesting litigants the same witness fees that would be paid to any other witness. *See* Fed. R. Civ. P. 45(c) (1938). I suspect this usually made nonparties whole because time and travel to appear were probably the main costs of document production back then; there were no photocopy machines, let alone computers. *See* Stephen Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Discovery Rules*, 39 B.C. L. Rev. 691, 743-44 (1998) ("[T]he drafters as a group would be amazed at . . . the advent of copying machines and computers; the huge size of law firms and litigation departments; the many factors leading to the large overhead of many firms . . . ."). But, even when it didn't because

131 21st Avenue South
Nashville, Tennessee, 37203-1181
615.322.4032
brian.fitzpatrick@vanderbilt.edu

unusual costs arose, the original Rule further permitted courts to make nonparties whole by requiring "the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, or documents." Fed. R. Civ. P. 45(b) (1938).[1]

Needless to say, the main costs of production are no longer the time and travel to appear with the documents. Although the Rule currently provides a hodgepodge of mechanisms by which nonparties can protect themselves from the cost of responding to requests from litigants,[2] they rarely make nonparties whole anymore. *See, e.g., Sedona, supra,* at 204 ("A number of respondents have generally found that courts are not sympathetic to undue cost arguments . . . ."). Might it be time to revise the Rule to make nonparties whole again?

Thank you for your consideration.

Sincerely,

Brian Fitzpatrick
Milton R. Underwood Chair in Free Enterprise
and Professor of Law

[1] *See also Park Bridge Corp. v. Elias*, 3 F.R.D. 93, 93 (S.D.N.Y. 1943) ("In connection with an examination by [a witness] not a party, a subpoena duces tecum was served . . . . Since the documents are . . . written in a foreign language, . . . the Clerk of the Court [shall] employ a competent person to translate them into English at the expense of the plaintiff."); *Pathe Lab'ys v. Du Pont Film Mfg. Corp.*, 3 F.R.D. 11, 14–15 (S.D.N.Y. 1943) ("The fact that the records are voluminous and cumbersome and are scattered throughout the various plants of E. I. du Pont is troublesome but . . . the plaintiff has offered to send accountants at its own expense . . . to inspect the records in lieu of having them brought before the Special Master. This should eliminate much of the inconvenience and expense to which the witness would otherwise be put.").

[2] *See* Fed. R. Civ. P. 45 (d)(1) (allowing courts to sanction litigants for "imposing undue burden or expense"), (d)(2) (requiring courts to protect objecting persons from "significant expense"), (d)(3) (requiring courts to quash or modify a subpoena that "subjects a person to undue burden"), (e)(1)(D) (allowing courts to order production of even inaccessible materials with "conditions").