COMMENT

ANALYSIS OF THE PROPOSED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 45 PERTAINING TO NONPARTY SUBPOENAS FOR DOCUMENTS*

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I. INTRODUCTION

Federal Rule of Civil Procedure 45 ("Rule 45"), which governs subpoenaing a nonparty for documents,[1] "is a workhorse in civil litigation."[2] The rule has a significant impact on practitioners because "nonparty discovery based on a subpoena is a frequent event in the federal courts."[3] In particular, two subsections of Rule 45 must be complied with when subpoenaing a nonparty for documents: Rule 45(a)(2)(C) and Rule 45(b)(2)(B).[4] Rule 45(a)(2)(C) specifies which court can issue the subpoena, and Rule 45(b)(2)(B) specifies where the subpoena may be served and sets a 100-mile limitation.[5]

Unfortunately, courts' interpretations of Rule 45(a)(2)(C) and Rule 45(b)(2)(B) vary significantly, and the interpretations are muddled.[6] As a result, practitioners do not have definite procedures for subpoenaing nonparties for documents.[7] The Civil Rules Advisory Committee noted, "Even the sophisticated firms may misread the present rule."[8] This lack of clarity is especially problematic given the procedure's importance and frequent use.[9]

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1. FED. R. CIV. P. 45(a)(1)(A)(iii); Highland Tank & Mfg. Co. v. PS Int'l, Inc., 227 F.R.D. 374, 379 (W.D. Pa. 2005); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2453, 2456 (3d ed. 2008).

2. Memorandum from the Honorable Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to the Honorable Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice & Procedure 2 (May 2, 2011, Revised June 16, 2011) [hereinafter Memorandum], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publication%20Aug%202011/CV_Report.pdf.

3. *Id.*

4. Doyle v. Gonzales, No. CV-10-0030-EFS, 2011 WL 2607167, at *5 (E.D. Wash. July 1, 2011); *see also* Memorandum, *supra* note 2, at 3 (explaining Rule 45's requirements for issuing a subpoena for documents).

5. FED. R. CIV. P. 45(a)(2)(C), (b)(2)(B).

6. *See infra* Part III (outlining various common law interpretations of Rule 45's provisions pertaining to nonparty subpoenas for documents).

7. *See infra* Part IV.A (explaining how the various interpretations render it unclear whether a nonparty subpoena for documents will be valid).

8. Minutes, Civil Rules Advisory Comm. 10 (Nov. 15–16 2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2010-min.pdf.

9. *See* David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the*

Moreover, technological changes in how information is stored and delivered have rendered the rules outdated.[10]

Despite inconsistent interpretations and technological changes, the last substantial revision to Rule 45 was over twenty years ago.[11] Fortunately, though, the Civil Rules Advisory Committee recognized problems with Rule 45 and accordingly issued a preliminary draft of proposed amendments in June 2011.[12] These amendments will become effective on December 1, 2013, if approved.[13] The changes vastly simplify and clarify the subpoena process.[14] They also account for technological advancements by expanding parties' ability to elicit documents from nonparties while still ensuring that nonparties are not unduly burdened.[15]

However, the amendments are not without problems. A proposed rule designating the proper court to handle subpoena-related motions as the court where compliance is required may be difficult to apply in the context of electronic document production.[16] In addition, the meaning of the word "production" in the proposed rule is ambiguous and renders it unclear which court should handle subpoena-related motions.[17] To clarify this rule, the Civil Rules Advisory Committee should designate a

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Federal Rules of Civil Procedure, 139 F.R.D. 197, 208–09 (1992); Memorandum, *supra* note 2, at 2.

10. *See infra* Part IV.B (describing how technological changes have created a need to change the rules).

11. Highland Tank & Mfg. Co. v. PS Int'l, Inc., 227 F.R.D. 374, 380 (W.D. Pa. 2005); COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 21 (June 2011) [hereinafter FED. R. CIV. P. 45 advisory committee's note (Proposed Amendments 2011)], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publication%20Aug%202011/CV_Report.pdf; Elizabeth A. Jenkins, *The 1991 Amendments to the Federal Rules*, FLA. B.J., Dec. 1991, at 11–12; Memorandum, *supra* note 2, at 2.

12. FED. R. CIV. P. 45 advisory committee's note (Proposed Amendments 2011), *supra* note 11, at 32; *see also* Memorandum, *supra* note 2, at 1–3 (discussing proposed changes to Rule 45).

13. ADMIN. OFFICE OF THE U.S. COURTS, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF PRACTICE AND PROCEDURE (Aug. 2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publication%20Aug%202011/Brochure.pdf.

14. *See infra* Part V (analyzing the proposed amendments in relation to the stated goals of the amendments).

15. *See infra* Part V (analyzing whether the proposed amendments account for technological advancements affecting discovery).

16. *See infra* text accompanying notes 176–182 (revealing a potential problem with the proposed amendments in the context of electronic document production).

17. *See infra* text accompanying notes 170–175 (revealing a potential problem with the word "production" in the proposed amendments).

specific place of compliance for electronically delivered documents and remove the word "production."[18]

This Comment begins in Part II by providing a brief history of the rules governing nonparty subpoenas for documents. Part III details conflicting common law interpretations of Rule 45 in order to give practitioners guidance in determining whether a subpoena is valid under the current rules and expose the muddled state of the current law. Part IV explains why Rule 45 should be modified. Lastly, Part V analyzes the proposed amendments to determine whether they rectify current problems with Rule 45 and to anticipate new issues that may arise.

II. HISTORY OF THE RULES GOVERNING NONPARTY SUBPOENAS FOR DOCUMENTS

Pursuant to Rule 45, nonparties to a suit may be subpoenaed for documents, electronically stored information, or other tangible things.[19] The subpoena must state the name of the issuing court, specify a time and place for production, and describe with reasonable specificity the type of documents or information to be produced.[20]

The last substantial revisions to Rule 45 were in 1991.[21] Although Rule 45 governs all types of subpoenas, three out of the five stated purposes of the 1991 revisions affected subpoenas for documents from nonparties:

> The purposes of this revision are (1) to clarify and enlarge the protections afforded persons who are required to assist the court by giving information or evidence; (2) to facilitate access . . . to documents and other information in the possession of persons who are not parties; [and] (3) to facilitate service of subpoenas for . . . evidence at places distant from the district in which an action is proceeding . . . .[22]

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18. *See infra* text accompanying notes 181–188 (suggesting changes to the proposed amendments).

19. FED. R. CIV. P. 45(a)(1)(A)(iii); Highland Tank & Mfg. Co. v. PS Int'l, Inc., 227 F.R.D. 374, 379 (W.D. Pa. 2005); WRIGHT & MILLER, *supra* note 1, § 2453, at 394, § 2456, at 414.

20. FED. R. CIV. P. 45(a)(1)(A); WRIGHT & MILLER, *supra* note 1, § 2453, at 394, § 2457, at 422.

21. *Highland*, 227 F.R.D. at 380; FED. R. CIV. P. 45 advisory committee's note (Proposed Amendments 2011), *supra* note 11, at 32; Jenkins, *supra* note 11, at 11–12; Memorandum, *supra* note 2, at 2–3.

22. FED. R. CIV. P. 45 advisory committee's note (1991). "Although not binding, the interpretations of the Federal Rules of Civil Procedure in the Advisory Committee Notes are accorded great weight in interpreting the federal rules." 32 AM. JUR. 2D *Federal Courts* § 308 (2007).

Paradoxically, the purpose was to enlarge the protection afforded to subpoenaed parties while at the same time to facilitate access to those subpoenaed parties' documents.[23] In addition to the rules, courts and commentators also recognize that nonparties should receive special protection from undue burden and expense because they are not parties to the suit.[24]

In order to fulfill these purposes, several major changes were made.[25] First, prior to 1991, there was confusion whether nonparties' documents could only be obtained in conjunction with a deposition.[26] The 1991 revisions clarified this rule by specifically allowing nonparties to be compelled to produce documents, even if they are not appearing for deposition.[27] In addition, the prior rule that only the court clerk could issue subpoenas was changed to allow attorneys to issue subpoenas on behalf of any district court.[28] Also, the revised rule specifically designates the court that issued the subpoena as the court in which to file a motion to quash or to modify the subpoena.[29]

When only the clerk could issue subpoenas and when depositions had to be taken, there was no ambiguity about which court should issue the subpoena.[30] However, because the 1991 revisions changed both of these rules, the revisions added Rule

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23. *See* FED. R. CIV. P. 45 advisory committee's note (1991).

24. *See* FED. R. CIV. P. 45(c)(1) ("A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena."); Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998) ("Non-parties have a different set of expectations. Accordingly, concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs."); *In re* Auto. Refinishing Paint Antitrust Litig., 229 F.R.D. 482, 495 (E.D. Pa. 2005) (stating "[t]he witness's status as a nonparty to the litigation should also be considered" when evaluating whether a subpoena is unduly burdensome); The Sedona Conference Working Group 1, *The Sedona Conference Commentary on Non-party Production & Rule 45 Subpoenas*, SEDONA CONF. J., Oct. 2008, at 198–99 [hereinafter Sedona Conference Working Group 1] ("Rule 45(c)(1) . . . reflects the prior decisions of Federal courts that status as a non-party is a factor entitled to special consideration inassessing [sic] undue burden. . . . Third parties should not be required to subsidize litigation in which they have no stake in the outcome.").

25. FED. R. CIV. P. 45 advisory committee's note (1991).

26. WRIGHT & MILLER, *supra* note 1, § 2457, at 419; Jenkins, *supra* note 11, at 12.

27. FED. R. CIV. P. 45(a)(1)(C); FED. R. CIV. P. 45 advisory committee's note (1991); WRIGHT & MILLER, *supra* note 1, § 2457, at 419–20; Jenkins, *supra* note 11, at 12; Siegel, *supra* note 9, at 205–06.

28. FED. R. CIV. P. 45(a)(3); Highland Tank & Mfg. Co. v. PS Int'l, Inc., 227 F.R.D. 374, 380 (W.D. Pa. 2005); FED. R. CIV. P. 45 advisory committee's note (1991); WRIGHT & MILLER, *supra* note 1, § 2453, at 395; Jenkins, *supra* note 11, at 12; Siegel, *supra* note 9, at 203–04.

29. FED. R. CIV. P. 45(c)(3)(A); WRIGHT & MILLER, *supra* note 1, § 2463.1, at 484–85; Siegel, *supra* note 9, at 230–31.

30. Siegel, *supra* note 9, at 204–05.

45(a)(2)(C) to specify which court should issue a subpoena for documents if that subpoena is separate from a subpoena for deposition attendance.[31] Further, Rule 45(b)(2)(B), which previously prohibited service of a subpoena beyond 100 miles of the hearing or trial, was modified to prohibit service of a subpoena beyond 100 miles of the hearing, trial, deposition, production, or inspection.[32]

Other changes to Rule 45 have been made since 1991, but none were substantial.[33] Of these minor changes, the most noteworthy was in 2006 when the rule was amended to explicitly recognize that electronically stored information can be subpoenaed just as tangible information can be subpoenaed.[34] The person serving the subpoena can specify the form in which they wish to receive the electronic data, but the subpoenaed party should have to produce the data in only one form.[35]

III. COMMON LAW INTERPRETATIONS OF RULE 45

Since 1991, courts have been called upon to interpret and apply the revisions to Rule 45. Problematically, courts vary in their interpretations of both Rules 45(a)(2)(C) and 45(b)(2)(B), and the rules are muddled. Section A of this Part categorizes how courts interpret Rule 45(a)(2)(C), which turns on the meaning of "production or inspection."[36] Section B of this Part categorizes how courts interpret Rule 45(b)(2)(B), which turns on which two localities the 100-mile limitation spans.[37] These dichotomies and categorizations are the result of this Comment's analysis because the courts often do not clearly articulate the reasoning for their Rule 45 holdings.[38] These categorizations should prove useful to

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31. FED. R. CIV. P. 45(a)(2)(C); FED. R. CIV. P. 45 advisory committee's note (1991); Siegel, *supra* note 9, at 205.

32. FED. R. CIV. P. 45(a)(1)(C), (b)(2)(B); *see also* Siegel, *supra* note 9, at 198–200 (comparing the text of "Old Rule 45" with "New Rule 45").

33. *See, e.g.*, FED. R. CIV. P. 45 advisory committee's note (2007) (changing only style and terminology); FED. R. CIV. P. 45 advisory committee's note (2006) (adding particularities regarding electronically stored information); FED. R. CIV. P. 45 advisory committee's note (2005) (making a small change to notification requirements).

34. FED. R. CIV. P. 45 advisory committee's note (2006); Sedona Conference Working Group 1, *supra* note 24, at 198.

35. FED. R. CIV. P. 45(d)(1); FED. R. CIV. P. 45 advisory committee's note (2006).

36. *See* FED. R. CIV. P. 45(a)(2)(C) ("A subpoena must issue . . . from the court for the district where the production or inspection is to be made.").

37. *See* FED. R. CIV. P. 45(b)(2)(B) ("[A] subpoena may be served at any place . . . within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection . . . .").

38. *See, e.g.*, Beach v. City of Olathe, Nos. CIV. A. 99-2210GTV, 99-2217GTV, 2001 WL 1098032, at *2 (D. Kan. Sept. 17, 2001) (failing to articulate whether the holding was due to the nonparties being located and served more than 100 miles away or due to the designated places of production being more than 100 miles away).

practitioners in determining whether a subpoena is valid in various jurisdictions under the current rules.

A. Proper Court to Issue a Subpoena Under Rule 45(a)(2)(C)

Rule 45(a)(2)(C) specifies which court must issue a subpoena to a nonparty: "A subpoena must issue . . . from the court for the district where the production or inspection is to be made."[39] Courts interpret "production or inspection" as referring to either the place the documents are located, the location of the person in custody of the documents, or the place the documents will be delivered.

First, the Fifth Circuit held Rule 45(a)(2)(C) means "that a federal court sitting in one district cannot issue a subpoena . . . to a non-party for the production of documents located in another district."[40] In other words, "the district where the production or inspection is to be made" is the place the documents are located.[41] Although no other federal appellate courts have concurred with the Fifth Circuit's interpretation, several district courts in other circuits have interpreted likewise.[42]

On the other hand, the Fifth Circuit also held that "the district where the production or inspection is to be made" refers to the location of the person in custody of the documents, which is not necessarily where the documents are located.[43] Although this holding was based on a prior version of Rule 45, the conclusion

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39. FED. R. CIV. P. 45(a)(2)(C).

40. Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 2 F.3d 1397, 1405–06 (5th Cir. 1993) (finding the Southern District of Texas could not subpoena records located in Mississippi).

41. *Natural Gas Pipeline Co. of Am.*, 2 F.3d at 1406; *see also* Burks v. Fulmer Helmets, Inc., No. 2:08-CV-28-A-A, 2009 WL 742723, at *1 (N.D. Miss. Mar. 17, 2009) (citing *Natural Gas Pipeline Co. of Am.*, 2 F.3d at 1406) (stating only district courts in Texas and California can issue subpoenas for documents located in their respective districts).

42. *E.g.*, Managed Care Solutions, Inc. v. Essent Healthcare, Inc., No. 09-60351-CIV, 2010 WL 3419420, at *2 (S.D. Fla. Aug. 27, 2010); Stockdale v. Stockdale, No. 4:08-CV-1773 CAS, 2009 WL 4030758, at *2 (E.D. Mo. Nov. 18, 2009); Myles v. Dierberg's Mkts., Inc., No. 4:09-CV-573 CAS, 2009 WL 3414903, at *1 (E.D. Mo. Oct. 22, 2009); City of St. Petersburg v. Total Containment, Inc., No. 07-191, 2008 WL 1995298, at *3 (E.D. Pa. May 5, 2008); Gutescu v. Carey Int'l, Inc., No. 01-4026-CIV, 2003 WL 25589034, at *2 (S.D. Fla. June 24, 2003).

43. Cates v. LTV Aerospace Corp., 480 F.2d 620, 621–23 (5th Cir. 1973). Ironically, it is not clear even the Fifth Circuit realizes the distinction because the court in *Natural Gas Pipeline Co. of America*, which held Rule 45(a)(2)(C) refers to the place the documents are located, did not mention *Cates* even though *Natural Gas Pipeline Co. of America* was decided after *Cates*. *See Natural Gas Pipeline Co. of Am.*, 2 F.3d at 1406; *see also* McAuslin v. Grinnell Corp., Nos. CIV. A. 97-775, 97-803, 1999 WL 24617, at *2–3 (E.D. La. Jan. 19, 1999) (holding based on both *Cates* and *Natural Gas Pipeline Co. of America* without recognizing their differences and treating them as one and the same).

that "a court cannot order production of records in the *custody and control* of a non-party located in a foreign judicial district" is applicable to current Rule 45.[44] The Eleventh Circuit concurred with this interpretation,[45] and several other district courts have likewise agreed.[46] In many cases, distinguishing between the location of the documents and the location of the person in custody of the documents is irrelevant because they are one and the same.[47] However, the distinction becomes relevant if the location of the documents differs from the location of the person in custody of the documents.[48]

In contrast, the Third Circuit explicitly disagreed with the Fifth Circuit and held that "'[p]roduction' refers to the delivery of documents, not their retrieval, and therefore 'the district in which the production . . . is to be made' is not the district in which the documents are housed but the district in which the subpoenaed party is required to turn them over."[49] Although other federal appellate courts have yet to concur, a majority of district courts have also interpreted Rule 45(a)(2)(C) as referring to the place the documents will be delivered as per the subpoena.[50]

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44. *Cates*, 480 F.2d at 624 (emphasis added); *McAuslin*, 1999 WL 24617, at *2–3 (denying motion to compel documents pursuant to a subpoena issued from the Eastern District of Louisiana because the movant failed to establish the documents were in the custody and control of an entity located within the Eastern District of Louisiana).

45. Ariel v. Jones, 693 F.2d 1058, 1060–61 (11th Cir. 1982) (citing *Cates*, 480 F.2d at 623).

46. *E.g.*, Hallamore Corp. v. Capco Steel Corp., 259 F.R.D. 76, 79–80 (D. Del. 2009); Sabol v. Brooks, 469 F. Supp. 2d 324, 328 (D. Md. 2006); Highland Tank & Mfg. Co. v. PS Int'l, Inc., 227 F.R.D. 374, 379 (W.D. Pa. 2005); Crafton v. U.S. Specialty Ins. Co., 218 F.R.D. 175, 177 (E.D. Ark. 2003); Echostar Commc'ns Corp. v. News Corp., 180 F.R.D. 391, 396 (D. Colo. 1998).

47. *See, e.g.*, *McAuslin*, 1999 WL 24617, at *1–3 (seeking to compel production of documents both located at a nonparty's Massachusetts headquarters and controlled by the nonparty's Massachusetts headquarters).

48. *See, e.g.*, *Cates*, 480 F.2d at 621–24 (reversing a Texas district court's order to compel the Department of the Navy to produce a document located in Virginia because the document was in the custody of the Secretary of the Navy who was located in Washington, D.C.).

49. Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 412, 413 & n.5 (3d Cir. 2004).

50. *E.g.*, Doyle v. Gonzales, No. CV-10-0030-EFS, 2011 WL 2607167, at *5 (E.D. Wash. July 1, 2011); Hall v. Associated Int'l Ins. Co., No. 11-CV-4013 JTM/DJW, 2011 WL 2604783, at *1 (D. Kan. June 30, 2011); Deployment Med. Consultants, Inc. v. Pipes, No. 08cv1959-JAH (BGS), 2011 WL 811579, at *2 (S.D. Cal. Mar. 2, 2011); Ace Hardware Corp. v. Celebration Ace Hardware, LLC, Nos. 09-109-SLR, 09 cv 66, 2009 WL 3242561, at *3 (D. Del. Oct. 8, 2009); Oracle, USA, Inc. v. SAP AG, No. 08-cv-02383-WDM-KMT, 2009 WL 1011321, at *2 (D. Colo. Apr. 14, 2009); CSX Transp., Inc. v. Superior Grain LLC, No. 4:07-cv-034, 2009 WL 948660, at *2 (D.N.D. Apr. 6, 2009); Hickman v. Hocking, No. 07-829-JPG, 2009 WL 35283, at *1 (S.D. Ill. Jan. 6, 2009); Brinkley v. Houk, No. 4:06CV0110, 2008 WL 4560777, at *1 (N.D. Ohio Oct. 8, 2008); Doe I v. Pauliewalnuts, No. 5:08MC00001, 2008 WL 4326473, at *1 (W.D. Va. Sept. 19, 2008); Monsanto Co. v.

To further complicate matters, even courts within the same jurisdiction do not always interpret the rule in the same way. For example, despite the Fifth Circuit's holdings that "production or inspection" means either the location of the documents[51] or the location of the person in custody of the documents,[52] several district courts in the Fifth Circuit have applied the rule as meaning the place the documents will be delivered.[53] Although these courts did not explicitly disagree with the Fifth Circuit or explicitly agree with the other circuits, their holdings focused on the place the documents will be delivered.[54] It appears these courts relied on their own interpretations of Rule 45(a)(2)(C) and not on precedent because they cited only to Rule 45(a)(2)(C) and not to other Fifth Circuit cases.[55] Similarly, district courts in the Third Circuit have not followed the Third Circuit's

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Victory Wholesale Grocers, No. mc 08-134(DRH)(WDW), 2008 WL 2066449, at *3 (E.D.N.Y. May 14, 2008); Insinga v. DaimlerChrysler Corp., No. 3:06-CV-1305 (DEP), 2008 WL 202701, at *1 (N.D.N.Y. Jan. 23, 2008); Stewart v. Mitchell Transp., No. 01-2546-JWL, 2002 WL 1558210, at *3 (D. Kan. July 8, 2002).

51. Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 2 F.3d 1397, 1406 (5th Cir. 1993).

52. Cates v. LTV Aerospace Corp., 480 F.2d 620, 621–23 (5th Cir. 1973).

53. *See* Guerriero v. Am. Nat'l Prop. & Cas. Co., No. 10-97-RET-SCR, 2010 WL 4955325, at *1 (M.D. La. Dec. 1, 2010) (holding subpoena facially invalid that was issued from the Western District of Louisiana because the production of documents was commanded to take place at an office in the Eastern District of Louisiana, and stating that the subpoena should have been issued from the Eastern District of Louisiana); Apache Corp. v. GlobalSantaFe Drilling Co., No. 06-1643, 2009 WL 872893, at *3 (W.D. La. Mar. 26, 2009) (holding subpoena facially invalid that was issued from the Western District of Louisiana because the production of documents was "commanded to take place" in the Northern District of Texas, and stating that the subpoena should have been issued from the Northern District of Texas); Omikoshi Japanese Rest. v. Scottsdale Ins. Co., No. 08-3657, 2008 WL 4829583, at *1–2 (E.D. La. Nov. 5, 2008) (denying motion to compel documents located in the Eastern District of Louisiana pursuant to a subpoena issued by the Eastern District of Louisiana because the subpoena "command[ed] the production of documents at" an office in the Middle District of Louisiana, and stating that the subpoena should have been issued from the Middle District of Louisiana); Stewart v. Am. Family Mut. Ins. Co., No. 06-09884, 2008 WL 440331, at *4 (E.D. La. Feb. 12, 2008) (holding subpoena procedurally defective that was issued from the Eastern District of Louisiana because the production of documents was to take place at a location in the Middle District of Louisiana); Bruce v. Allen, No. 07-0480, 2008 WL 269023, at *2 (W.D. La. Jan. 25, 2008) (denying motion to subpoena records that was issued from the Western District of Louisiana because the production of documents was "to be made" at a facility in Alabama, and stating that the subpoena should have been issued from the Middle District of Alabama); Kansas City S. Ry. Co. v. Nichols Constr. Corp., No. 05-01182, 2008 WL 199875, at *3 (E.D. La. Jan. 22, 2008) (holding subpoena procedurally defective that was issued from the Eastern District of Louisiana because the production of documents was to take place at an office in Texas rather than a location in the Eastern District of Louisiana).

54. *See* cases cited *supra* note 53 (focusing on where the documents would be delivered when ruling on which court should issue the subpoena).

55. *See* cases cited *supra* note 53 (opining on the validity of nonparty subpoenas for documents without mentioning *Cates* or *Natural Gas Pipeline Co. of America*).

interpretation.[56] It is remarkable that these district courts held contrary to appellate court precedent that was directly on point, yet never mentioned the binding precedent.[57] Further, even different judges within the same district have interpreted the rule differently.[58]

B. Proper Service of a Subpoena Under Rule 45(b)(2)(B)

In order for a nonparty subpoena to be valid, the subpoena must comply with both Rules 45(a)(2)(C) and 45(b)(2)(B).[59] Rule 45(b)(2)(B) specifies where a subpoena on a nonparty can be served: "[A] subpoena may be served at any place . . . outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection."[60] Rule 45(b)(2)(B) is subject to Rule 45(c)(3)(A)(ii),[61] which provides that "the issuing court must quash or modify a subpoena that . . . requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person."[62]

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56. *Compare* Hallamore Corp. v. Capco Steel Corp., 259 F.R.D. 76, 79–80 (D. Del. 2009) (holding subpoena invalid that was issued from the District of Delaware because the documents were located in Pennsylvania and the subpoenaed party's Delawarean agent did not have control over the documents), City of St. Petersburg v. Total Containment, Inc., No. 07-191, 06-20953-CIV-LENARD, 2008 WL 1995298, at *3–4 (E.D. Pa. May 5, 2008) (holding subpoena facially valid that was issued from the Eastern District of Pennsylvania because the documents were located in the Eastern District of Pennsylvania, even though the documents were to be delivered to Tennessee), *and* Highland Tank & Mfg. Co. v. PS Int'l, Inc., 227 F.R.D. 374, 379 (W.D. Pa. 2005) ("[T]he subpoena should command production in the district court where the witness resides or where the headquarters of the witness are located."), *with* Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 412 (3d Cir. 2004) (holding "production or inspection" means the place the documents will be delivered).

57. *See, e.g.*, *Hallamore Corp.*, 259 F.R.D. at 79–80 (opining on the validity of nonparty subpoenas for documents without mentioning *Hay Group*); *Total Containment, Inc.*, 2008 WL 1995298, at *3–4 (same); *Highland*, 227 F.R.D. at 379 (same).

58. *Compare Hallamore Corp.*, 259 F.R.D. at 79–80 (location of the person in custody), *with* Ace Hardware Corp. v. Celebration Ace Hardware, LLC, Nos. 09-109-SLR, 09 cv 66, 2009 WL 3242561, at *3 (D. Del. Oct. 8, 2009) (place of delivery); McAuslin v. Grinnell Corp., Nos. CIV. A. 97-775, 97-803, 1999 WL 24617, at *2–3 (E.D. La. Jan. 19, 1999) (location of the person in custody), *with Omikoshi Japanese Rest.*, 2008 WL 4829583, at *1 (place of delivery); Echostar Commc'ns Corp. v. News Corp., 180 F.R.D. 391, 396 (D. Colo. 1998) (location of the person in custody), *with* Oracle, USA, Inc. v. SAP AG, No. 08-cv-02383-WDM-KMT, 2009 WL 1011321, at *2 (D. Colo. Apr. 14, 2009) (place of delivery).

59. FED. R. CIV. P. 45(a)(2)(C), (b)(2)(B); Doyle v. Gonzales, No. CV-10-0030-EFS, 2011 WL 2607167, at *5 (E.D. Wash. July 1, 2011); Memorandum, *supra* note 2, at 3.

60. FED. R. CIV. P. 45(b)(2)(B).

61. *Id.*

62. FED. R. CIV. P. 45(c)(3)(A)(ii).

Courts interpret the territorial 100-mile limitation from Rules 45(b)(2)(B) and 45(c)(3)(A)(ii) as spanning between four distinct sets of localities: the place of *service* must not be more than 100 miles from the jurisdiction of the *court* that issued the subpoena, the place of *service* must not be more than 100 miles from the place the documents will be *delivered*, the *location* of the documents or nonparty must not be more than 100 miles from the place the documents will be *delivered*, and the place the documents will be *delivered* must not be more than 100 miles from the jurisdiction of the *court* that issued the subpoena.[63] In contrast, some courts opine any 100-mile limitation is inapplicable to subpoenas for documents that do not have to be delivered in person.[64]

First, the Northern District of Ohio interpreted Rule 45(b)(2)(B) as meaning the place of service must not be more than 100 miles from the jurisdiction of the court that issued the subpoena.[65] The District of Kansas interpreted similarly; however, it is not clear if this was due to the nonparties being served more than 100 miles away from the issuing court or due to the designated places of production being more than 100 miles away from the issuing court.[66] Other courts have considered the place of service when applying the 100-mile limitation, but they have been unclear exactly which point from the place of service the 100 miles extends.[67]

A common interpretation of Rule 45(b)(2)(B) is that the place of service must not be more than 100 miles from the place the documents will be delivered.[68] However, keep in mind, the

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63. *See infra* text accompanying notes 65–73 (discussing the four different interpretations of the 100-mile limitation).

64. *See infra* text accompanying notes 74–81 (discussing the applicability of the 100-mile limitation).

65. *See* Brinkley v. Houk, No. 4:06CV0110, 2008 WL 4560777, at *1–3 (N.D. Ohio Oct. 8, 2008) (quashing subpoena issued from the Northern District of Ohio because the nonparty served was located in the Southern District of Ohio, and stating the subpoena must be issued from the Southern District of Ohio).

66. *See* Beach v. City of Olathe, Nos. CIV. A. 99-2210GTV, 99-2217GTV, 2001 WL 1098032, at *2 (D. Kan. Sept. 17, 2001) (quashing subpoenas issued from the District of Kansas when the subpoenas were served upon nonparties located in Illinois and Missouri and the respective designated "places of production and inspection" were Illinois and Missouri because Illinois and Missouri are not within 100 miles of the District of Kansas).

67. *See* Legion Ins. Co. v. John Hancock Mut. Life Ins. Co., 33 F. App'x 26, 27–28 (3d Cir. 2002) ("[A] subpoena [for documents] issued by a federal court cannot be served upon a nonparty for the production of documents located outside the geographic boundaries specified in Rule 45."); Traveler v. CSX Transp., Inc., No. 1:06 CV 56, 2006 WL 2375480, at *1–2 (N.D. Ind. Aug. 16, 2006) (finding subpoena unenforceable that was issued from the Northern District of Indiana because the documents were located and the nonparty was served in Florida, which is outside the 100-mile territorial limitation).

68. *See* Jimena v. UBS AG Bank, Inc., No. 1:07-cv-00367-OWW-SKO, 2010 WL

majority of courts also hold subpoenas must be issued from the court in which the documents will be delivered;[69] thus, in those jurisdictions, this interpretation is the same as the previous approach that the place of service must not be more than 100 miles from the jurisdiction of the court that issued the subpoena.

As opposed to applying the 100-mile limitation to the distance between the place of service and another locality, some courts have interpreted the 100-mile limitation to mean the location of the documents or nonparty must not be more than 100 miles from the place the documents will be delivered.[70] Although the outcome under this interpretation usually will not differ from the immediately preceding one, because usually the location of the documents and nonparty is the same as the location at which the nonparty is served, the locations could differ.[71]

The Northern District of Mississippi did not apply the 100-mile limitation to the place of service either; rather, it held the place the documents will be delivered must not be more than 100 miles from the jurisdiction of the court that issued the

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3397431, at *3 (E.D. Cal. Aug. 27, 2010) (holding subpoena procedurally invalid because the nonparty was served in Sunnyvale, California, but the production of documents was to take place over 100 miles from Sunnyvale, in Fresno, California); Cramer v. Target Corp., No. 1:08-CV-1693-OWW-SKO, 2010 WL 1791148, at *1–2 (E.D. Cal. May 4, 2010) (finding subpoenas procedurally invalid because the nonparty was served in Minnesota but the production of documents was to take place more than 100 miles from Minnesota, in Sacramento, California); Insinga v. DaimlerChrysler Corp., No. 3:06-CV-1305 (DEP), 2008 WL 202701, at *1–2 (N.D.N.Y. Jan. 23, 2008) (holding subpoena procedurally invalid because the nonparty was served in Woodbury, New York, but the production of documents was to take place in a an office more than 100 miles from Woodbury, in Buffalo, New York); Hecht v. Don Mowry Flexo Parts, Inc., 111 F.R.D. 6, 8–9, 11 (N.D. Ill. 1986) (holding subpoena invalid that was served on a nonparty in Ohio because the place of service, Ohio, was more was more than 100 miles from Chicago, where the subpoena was issued from and where the documents were to be delivered).

69. *See supra* text accompanying notes 49–50 (discussing the interpretation that Rule 45(a)(2)(C) refers to the place the documents will be delivered).

70. *See* Ott v. City of Milwaukee, 274 F.R.D. 238, 242 (E.D. Wis. 2011) (requiring production of documents if the movant retrieved the documents from the nonparty, so that the nonparty did not have to travel over 100 miles from their location to the location specified on the subpoena for document delivery); Cincinnati Ins. Co. v. Cochran, No. 5:05cv93/RV/MD, 2005 WL 5277203, at *3–4 (N.D. Fla. Sept. 22, 2005) (holding subpoena invalid that was issued from the Northern District of Florida for documents located in the Northern District of Florida because the production of documents was to take place in Alabama); Highland Tank & Mfg. Co. v. PS Int'l, Inc., 227 F.R.D. 374, 380–81 (W.D. Pa. 2005) ("[A] nonparty can only be compelled by an issuing court to produce documents within 'certain geographic limitations, usually no more than 100 miles from the nonparty's location.'" (quoting Anderson v. Gov't of Virgin Islands, 180 F.R.D. 284, 289 (D.V.I. 1998)).

71. *See, e.g.*, Cates v. LTV Aerospace Corp., 480 F.2d 620, 621–23 (5th Cir. 1973) (ruling on the validity of a subpoena served in Texas for a document located in Virginia and in the custody of someone in Washington, D.C.).

subpoena.[72] This court stated, "[F]oreign district courts . . . cannot compel the return of documents outside their respective jurisdictions."[73]

Lastly, the Eighth Circuit has suggested and numerous district courts have held the territorial 100-mile limitation is inapplicable to production of documents that do not have to be delivered in person, such as documents that can be solely mailed or emailed.[74] Many of these courts pointed out that Rule

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72. *See* Burks v. Fulmer Helmets, Inc., No. 2:08-CV-28-A-A, 2009 WL 742723, at *1 (N.D. Miss. Mar. 17, 2009) (finding subpoenas issued from Texas and California district courts defective because they "require[d] the return of documents to either Madison, Mississippi or Clarksdale, Mississippi—both of which are located well outside either [the Texas or California district courts'] jurisdictions").

73. *Id.*

74. *See In re* Sec. Life Ins. Co. of Am., 228 F.3d 865, 868, 872 (8th Cir. 2000) (dictum) (finding subpoena that was served in California did not violate the 100-mile limitation, even though the arbitration would take place in Minnesota, because a subpoena for only documents does not require compliance with the 100-mile limitation); Deployment Med. Consultants, Inc. v. Pipes, No. 08cv1959-JAH (BGS), 2011 WL 811579, at *12 (S.D. Cal. Mar. 2, 2011) (finding subpoena that required "production in" San Diego did not violate the 100-mile limitation, even though the documents and nonparty in control of the documents were located in Washington, because the "[nonparty] is only required to mail the documents, or have them delivered to [movant's] office in San Diego [and] [n]obody is required to travel to California"); U.S. Bank Nat'l Ass'n v. James, 264 F.R.D. 17, 19 (D. Me. 2010) (finding subpoena that required "production" of documents in Portland, Maine, did not violate the 100-mile limitation, even though the nonparty was located more than 100 miles away from Portland, because Rule 45(c)(2)(A) does not require appearance by nonparties at the place of production, the documents could be "produced" in Maine by mail, and "a majority of the courts that have dealt directly with the 100-mile issue have held that such a subpoena should be enforced"); Walker v. Ctr. for Food Safety, 667 F. Supp. 2d 133, 135, 137–38 (D.D.C. 2009) (finding subpoena that required production of documents in Atlanta, Georgia, did not violate the 100-mile limitation, even though the nonparty was located more than 100 miles away from Atlanta in Washington, D.C., because Rule 45(c)(2)(A) does not require appearance by nonparties at the place of production); Premier Election Solutions, Inc. v. Systest Labs Inc., No. 09-cv-01822-WDM-KMT, 2009 WL 3075597, at *3 (D. Colo. Sept. 22, 2009) (finding the "100-mile range limitation inapplicable to the case at bar" because Rule 45(c)(2)(A) does not require appearance by nonparties at the place of production, the nonparty's prior production of documents had been by e-mail or regular mail, there was no indication the nonparty intended to travel to produce any documents, and the subpoena did not require in person production); Tubar v. Clift, No. C05-1154JCC, 2007 WL 214260, at *6 (W.D. Wash. Jan. 25, 2007) (finding the 100-mile limitation inapplicable to a subpoena that commanded documents to be produced at a law firm in Seattle, Washington, even though the nonparty was served in New Jersey, because Rule 45(c)(2)(A) does not require appearance by nonparties at the place of production and the subpoena did not require anyone to personally escort the documents to Seattle); Jett v. Penner, No. Civ S-02-2036 GEB JFM P, 2007 WL 127790, at *2 (E.D. Cal. Jan. 12, 2007) (finding subpoena that required "production in" San Francisco did not violate the 100-mile limitation, even though the documents were located more than 100 miles from San Francisco, because Rule 45(c)(2)(A) does not require appearance by nonparties at the place of production, the nonparty had the documents in his possession, and the nonparty was not required to deliver the documents in person); Stewart v. Mitchell Transp., No. 01-2546-JWL, 2002 WL 1558210, at *2–3 (D. Kan. July 8, 2002) (finding subpoenas that required documents to be "produced at" a law firm in Kansas did not violate the 100-mile limitation, even

45(c)(2)(A) does not require appearance by nonparties at the place of production.[75] The Eighth Circuit opined it "d[id] not believe an order for the production of documents requires compliance with Rule 45(b)(2)'s territorial limit . . . because the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel."[76] However, other district courts, including a district court in the Eighth Circuit, have held the opposite: the 100-mile limitation is applicable even if the documents can just be mailed.[77] The District of Columbia District Court reasoned "the limitation in Rule 45 unequivocally applies . . . [because Rule 45] draws no distinction whatsoever between being compelled to testify and being compelled to produce documents at a certain place."[78] In addition, the Eastern District of Louisiana has commented on the 100-mile limitation in the context of depositions.[79] In dictum, it stated the technology of the modern era has rendered the "100 mile rule" unjustified and "[m]odern day litigation should not be restrained by antiquated relics of a bygone era."[80] However, even though the court would have liked Rule 45 to be amended, it recognized it was restrained to only interpreting the plain language of the rule, and it could not allow modern day realities to influence its analysis of the rule.[81]

IV. REASONS WHY RULE 45 SHOULD BE MODIFIED

The last substantial revision to Rule 45 was over twenty years ago.[82] Since then, a multitude of conflicting interpretations

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though the nonparties were located in Kentucky, Tennessee, Texas, and Wisconsin, because the "entities subpoenaed [were] merely required to mail the documents, or have them delivered, to . . . Kansas . . . [and] [n]o representative [was] required *to travel* to Kansas").

75. *See* cases cited *supra* note 74 (reasoning the 100-mile limitation inapplicable in part because of Rule 45(c)(2)(A)); *see also* FED. R. CIV. P. 45(c)(2)(A) ("A person commanded to produce documents . . . need not appear in person at the place of production . . . .").

76. *In re Sec. Life Ins. Co. of Am.,* 228 F.3d at 872 (dictum).

77. *See* Miller v. Holzmann, 471 F. Supp. 2d 119, 121 (D.D.C. 2007) (rejecting the government's argument "that the 100-mile limitation is inapplicable because the subpoenas do not require the witnesses' attendance anywhere but only the production of documents"); *see also* Cincinnati Ins. Co. v. Cochran, No. 5:05cv93/RV/MD, 2005 WL 5277203, at *3–4 (N.D. Fla. Sept. 22, 2005) (affirming a magistrate judge's order quashing a subpoena that was issued from the Northern District of Florida for documents located in the Northern District of Florida because the production of documents was to take place in Alabama, even though the documents could be mailed to Alabama).

78. *Miller*, 471 F. Supp. 2d at 121.

79. *In re* Vioxx Prods. Liab. Litig., 438 F. Supp. 2d 664, 667–69 (E.D. La. 2006).

80. *Id.* at 668.

81. *Id.* at 667–68.

82. *See* Highland Tank & Mfg. Co. v. PS Int'l, Inc., 227 F.R.D. 374, 380 (W.D. Pa.

of those revisions have rendered the procedures for subpoenaing nonparties unclear. Moreover, technological changes in how information is stored and delivered have rendered the rules outdated. Rule 45 should be modified to reconcile the conflicting interpretations and to adapt to technological changes.

A. To Reconcile Conflicting Interpretations

First and foremost, Rule 45's provisions governing nonparty subpoenas for documents need to be changed in order to reconcile the current conflicting interpretations outlined in the previous section.[83] Particularly troubling is that courts within jurisdictions do not always interpret the rules the same way,[84] and that some courts even disregard the rules.[85] These inconsistencies make it difficult for practitioners to predict how courts will rule on nonparty subpoenas and to know whether such subpoenas are valid.[86]

For instance, suppose a party to a lawsuit pending in the Southern District of Texas needs to subpoena documents from a nonparty who resides in New Jersey and keeps documents in a safe-deposit box in New York City. Which court should the attorney issue the subpoena from? Under the current rules, the answer to this basic question is unclear.[87] According to Fifth Circuit precedent,[88] the subpoena is valid only if it is issued from the Southern District of New York because that is where the documents are located.[89] According to other Fifth Circuit

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2005) (stating Rule 45 was amended in 1991); FED. R. CIV. P. 45 advisory committee's note (Proposed Amendments 2011), *supra* note 11, at 20 (observing Rule 45 was amended in 1991); Jenkins, *supra* note 11, at 11–12 (emphasizing Rule 45 was amended in 1991); Memorandum, *supra* note 2, at 2–3 (noting Rule 45 was extensively amended in 1991).

83. *See supra* Part III (discussing the various court interpretations of Rule 45(a)(2)(C) and Rule 45(b)(2)(B)).

84. *See supra* text accompanying notes 51–58 (discussing examples of conflicting interpretations within jurisdictions).

85. *See supra* text accompanying notes 74–81 (discussing how some courts hold the 100-mile limitation inapplicable to production of documents that do not have to be delivered in person, while other courts follow the rule).

86. *See infra* text accompanying notes 87–97 (illustrating how the various interpretations create a multitude of possible combinations of issuing courts, places of service, and places of delivery that could be deemed valid or invalid).

87. *See infra* text accompanying notes 90–92 (analyzing various answers under different interpretations of the rules).

88. Fifth Circuit precedent is analyzed because the Southern District of Texas is in the Fifth Circuit. *Court Locator*, U.S. CTS., http://www.uscourts.gov/court_locator.aspx (last visited Aug. 23, 2012).

89. *See supra* text accompanying notes 40–41 (explaining that the Fifth Circuit has held subpoenas must issue from the district in which the documents are located); *Daniel Patrick Moynihan United States Courthouse New York, New York*, U.S. D. CT., S.D.N.Y., http://www.nysd.uscourts.gov/site_manhattan.php (last visited Aug. 19, 2012) (New York,

precedent, the subpoena is valid only if it is issued from the District of New Jersey because that is where the nonparty with custody of the documents is located.[90] Finally, according to some district courts in the Fifth Circuit and Third Circuit precedent,[91] the subpoena is valid only if it is issued from whichever place the documents will be delivered as per the subpoena.[92]

Next, what are the geographical restrictions? Assuming the subpoena will be served on the nonparty at his residence in New Jersey, some courts would require the issuing court be no more than 100 miles from New Jersey,[93] while others would require the documents be delivered no more than 100 miles from New Jersey.[94] On the other hand, some courts would not restrict based on service in New Jersey; rather, they would require the documents be delivered no more than 100 miles from New York because the documents are located in New York.[95] Yet, some courts would require the documents be delivered no more than 100 miles from the issuing court.[96] Finally, some courts would conclude if the documents can be mailed, none of the previously mentioned 100-mile limitations even apply.[97] Consequently, there are a multitude of possible combinations of issuing courts, places of service, and places of delivery that could be deemed valid or invalid depending upon the judge.[98]

New York is in the Southern District of New York).

90. *See supra* text accompanying notes 43–44 (explaining that the Fifth Circuit has also held subpoenas must issue from the district in which the person in custody of the documents is located, which is not necessarily where the documents are located).

91. Third Circuit precedent is analyzed because New Jersey is in the Third Circuit. *Court Locator*, U.S. CTS., http://www.uscourts.gov/court_locator.aspx (last visited July 8, 2012).

92. *See supra* text accompanying notes 49–55 (explaining that the Third Circuit and district courts in the Fifth Circuit have held subpoenas must issue from the district in which the documents will be delivered).

93. *See supra* text accompanying notes 65–67 (discussing the interpretation that the place of service must not be more than 100 miles from the jurisdiction of the court that issued the subpoena).

94. *See supra* text accompanying note 68 (articulating the interpretation that the place of service must not be more than 100 miles from the place the documents will be delivered).

95. *See supra* text accompanying notes 70–71 (explaining the interpretation that the location of the documents must not be more than 100 miles from the place the documents will be delivered).

96. *See supra* text accompanying notes 72–73 (discussing the interpretation that the place the documents will be delivered must not be more than 100 miles from the jurisdiction of the court that issued the subpoena).

97. *See supra* text accompanying notes 74–76 (describing the interpretation that the 100-mile limitation is inapplicable).

98. *See supra* text accompanying notes 87–97 (illustrating how the various interpretations create a multitude of possible combinations of issuing courts, places of service, and places of delivery that could be deemed valid).

Because the essence of Rule 45 is to determine jurisdictional issues spanning multiple localities,[99] a consistent interpretation of the rule by jurisdictions across the country is needed. Furthermore, "nonparty discovery based on a subpoena is a frequent event in the federal courts,"[100] and the geographical reach of a subpoena is "one of the most important subjects in Rule 45 and, indeed, in all of civil practice."[101] For these reasons, the rules should be modified to clearly identify which court is to issue a nonparty subpoena for documents and—if a geographical limitation is maintained—to clearly identify between which two localities the 100-mile limitation spans.

B. To Adapt to Technological Changes

"The 100-mile rule set out in Fed. R. Civ. P. 45(b)(2) is designed to protect witnesses from the harassment of long, tiresome trips, and to minimize the costs of litigation."[102] However, technology no longer requires travel to deliver documents, so it is no longer burdensome to produce documents to a location over 100 miles away.[103] For example, a subpoena for documents can be complied with by delivering the documents via mail or email.[104] Indeed, Rule 45 does not even require personal delivery of documents.[105]

The confusion and problems with the 100-mile limitation arose from the 1991 revisions to Rule 45.[106] The rules were revised to allow nonparties to be compelled to produce documents without

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99. *See* FED. R. CIV. P. 45(a)(2), (b)(2) (providing which court is to issue subpoenas to which localities and where subpoenas can be served).

100. Memorandum, *supra* note 2, at 2.

101. Siegel, *supra* note 9, at 208.

102. 28 FED. PROC., L. ED. *Process* § 65:251, at 638–39 (2006).

103. *See In re* Sec. Life Ins. Co. of Am., 228 F.3d 865, 871–72 (8th Cir. 2000) (dictum) ("[T]he burden of producing documents need not increase appreciably with an increase in the distance those documents must travel.").

104. *See supra* note 74 (describing cases in which nonparties did not have to appear in person to deliver documents).

105. FED. R. CIV. P. 45(c)(2)(A) ("A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.").

106. *See infra* text accompanying notes 107–108 (explaining how the 1991 revisions created confusion and problems). Interestingly, David D. Siegel recognized the ambiguity of the 100-mile limitation in the 1991 revised rules and foresaw interpretation problems when, in 1992, he wrote, "[W]hen one consults Rule 45 for guidance about the territorial reach of a subpoena and starts to hop back and forth among the several provisions just cited, the rule comes off like a Tower of Babel, an inferno with shrill voices jabbering simultaneously in a confusion of tongues." Siegel, *supra* note 9, at 209.

appearing for deposition.[107] However, instead of forming a new rule to protect nonparties from undue burden when producing only documents pursuant to this new document-only subpoena, the existing 100-mile limitation for depositions was simply modified to include document production as well as deposition attendance.[108] The result was an unclear and unnecessary provision.[109]

In addition, many of the current interpretations of Rules 45(a)(2)(C) and 45(b)(2)(B) hinge on the location of the documents or the place the documents will be delivered.[110] These interpretations could prove problematic in the future as technology changes how information is stored and delivered.[111] Nowadays, due to the proliferation of electronic data storage, the locality in which a piece of information is stored, controlled, and retrieved could all differ.[112] For example, with cloud computing, a user in New York could upload a spreadsheet to "the cloud"; the spreadsheet could then be stored on a computer in California, controlled by a service provider in Houston, and retrieved by the user in New York.[113] In such a scenario, if a subpoena for the spreadsheet needs to issue from the district in which the documents are located,[114] it would be unclear in which district the documents are located for purposes of the

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107. WRIGHT & MILLER, *supra* note 1, § 2457, at 419–20; Jenkins, *supra* note 11, at 12.

108. FED. R. CIV. P. 45 advisory committee's note (1991); *see also* Siegel, *supra* note 9, at 199–200 (providing the text of "Old Rule 45" and "New Rule 45").

109. *See supra* Part III.B (describing the various court interpretations of the 100-mile limitation); *supra* text accompanying notes 102–105 (explaining why it is unnecessary to have a 100-mile limitation to protect parties from undue burden).

110. *See supra* Part III (expounding on the common law interpretations of Rules 45(a)(2)(C) and 45(b)(2)(B)).

111. *See* James Gibson, *A Topic Both Timely and Timeless*, 10 RICH. J.L. & TECH. 49, P 2 (2004), http://jolt.richmond.edu/v10i5/article49.pdf (**"**Computer technology has taken us from a world of paper to a world of digital media . . . [a]nd the tremendous growth of electronic documentation shows no signs of slowing . . .**"**); MICHAEL ARMBRUST ET AL., U.C. BERKELEY, ABOVE THE CLOUDS: A BERKELEY VIEW OF CLOUD COMPUTING 1, 4–5, (Feb. 10, 2009), *available at* http://www.eecs.berkeley.edu/Pubs/TechRpts/2009/EECS-2009-28.pdf ("Cloud Computing . . . has the potential to transform a large part of the IT industry."); *cf.* Tanya L. Forsheit, *E-Discovery Involving Cloud Facilities*, *in* PRACTISING LAW INST., CLOUD COMPUTING 2010: IS YOUR COMPANY READY? 157, 160–61 (2010) (propounding how Rule 45 would be applied to a nonparty cloud service provider compelled to produce documents).

112. *See* Gibson, *supra* note 111, at 2 ("Computer technology . . . has changed almost everything about our relationship with information: how we create it, how much of it we create, how it is stored, who sees it, how and when we dispose of it."); Kimberly A. Baldwin-Stried Reich, *Preparing for Discovery*, J. AHIMA (Oct. 21, 2010, 1:55 PM), http://journal.ahima.org/2010/10/21/preparing-for-discovery ("Paper documents are typically consolidated and maintained in a single file folder[, but d]igital data may reside in numerous locations[.]").

113. *See* ARMBRUST et al., *supra* note 111, at 1, 4–5 (explaining cloud computing, including the roles of users and service providers).

114. *See supra* text accompanying notes 40–42 (explaining some courts' holdings that a subpoena must issue from the district in which the documents are located).

subpoena. Thus, given the way modern technology has redefined how information is stored and accessed,[115] there is an exigency to update the subpoena rules to reflect these technological changes.

V. ANALYSIS OF THE PROPOSED AMENDMENTS TO RULE 45

The Civil Rules Advisory Committee is tasked with continuously studying the operation of the Federal Rules of Civil Procedure, drafting amendments to the rules, and reviewing public comments on amendments.[116] It directly reports to the "Standing Committee on Rules of Practice, Procedure and Evidence, [which is] composed of eight judges, five lawyers, and one law professor."[117] In turn, the Standing Committee "report[s] to the Judicial Conference of the United States, [which is] a group of 27 federal judges chaired by the Chief Justice who meet twice a year to set policy for the federal courts."[118]

The Civil Rules Advisory Committee recognized that "[s]ome issues have emerged since the 1991 revision" of Rule 45 and accordingly issued a preliminary draft of proposed amendments to Rule 45 in June 2011.[119] These amendments include the following modifications pertaining to nonparty subpoenas for documents: providing the proper court to issue a subpoena is the court where the action is pending,[120] permitting nationwide service of process,[121] designating the place of compliance as a reasonably convenient place,[122] and providing the proper court to handle subpoena-related motions is the court where compliance is required.[123] The amendments will become effective on December 1, 2013, if approved.[124] They must be "approved, with or without revision, by the relevant advisory committee, the

115. *See supra* text accompanying notes 111–113 (explaining how technology has changed).

116. 1 GUIDE TO JUDICIARY POLICIES AND PROCEDURES §§ 440.10, 440.20.10 (2011), *available at* http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/JudicialConfProcedures.aspx; Luther T. Munford, *Public Comment on the Work of Federal Rules Committees*, PRAC. LITIGATOR, July 1998, at 15–16.

117. Munford, *supra* note 116, at 16.

118. *Id.*

119. Memorandum, *supra* note 2, at 1–2.

120. *See infra* Part V.A (analyzing changes to Rule 45(a)(2)).

121. *See infra* Part V.B (explaining changes to Rule 45(b)(2)).

122. *See infra* Part V.C (discussing the new Rule 45(c)).

123. *See infra* Part V.D (interpreting the changes to rules regarding subpoena-related motions).

124. PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF PRACTICE AND PROCEDURE, *supra* note 13.

Standing Committee, the Judicial Conference, . . . the Supreme Court, and . . . Congress."[125]

When publishing the amendments, the Civil Rules Advisory Committee stated, "Overall, one important objective of these amendments is to simplify the operation of Rule 45. The Committee invites comments on whether the efforts at simplification are successful."[126] It emphasized this goal a second time in the beginning paragraph of its committee note: "The goal of the present amendments is to clarify and simplify the rule."[127] Therefore, this Part analyzes whether these clarification and simplification objectives have been met and whether this Comment's previously identified reasons why Rule 45 should be modified—to reconcile conflicting interpretations and to adapt to technological changes[128]—have been addressed.[129] This Part also evaluates each of the modifications pertaining to nonparty subpoenas for documents, discusses the interplay between the separate modifications, and suggests changes.

A. Proper Court to Issue a Subpoena Is the Court Where the Action Is Pending

First, the proposed amendments modify Rule 45(a)(2) by providing that "a subpoena must issue from the court where the action is pending."[130] This court is aptly termed the "[i]ssuing [c]ourt."[131] The amendments completely eliminate current Rule 45(a)(2) subsections (A) through (C), which specify different rules for different types of subpoenas.[132]

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125. *Id.*

126. Memorandum, *supra* note 2, at 5. The Civil Rules Advisory Committee solicited comments on other topics as well. *Id.* at 4–5. However, it clarified that "[t]hese specific invitations for comment should not obscure the importance of comments on all aspects of the proposal. The most important comments, indeed, may be those that reveal issues that were not identified in earlier deliberations." *Id.* at 2. This Comment remarks on only topics and amendments that affect nonparty subpoenas for documents.

127. FED. R. CIV. P. 45 advisory committee's note (Proposed Amendments 2011), *supra* note 11, at 20.

128. *See supra* Part IV (identifying reasons Rule 45 should be changed).

129. *See infra* Part V.A–D (analyzing the proposed amendments to Rule 45).

130. COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 3 (June 2011) [hereinafter FED. R. CIV. P. 45 (Proposed Amendments 2011)], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publication%20Aug%202011/CV_Report.pdf; FED. R. CIV. P. 45 advisory committee's note (Proposed Amendments 2011), *supra* note 11, at 20–21; Memorandum, *supra* note 2, at 2.

131. FED. R. CIV. P. 45(a)(2) (Proposed Amendments 2011), *supra* note 130, at 3.

132. *Compare* FED. R. CIV. P. 45(a)(2) (specifying different rules depending on the type of evidence subpoenaed), *with* FED. R. CIV. P. 45(a)(2) (Proposed Amendments 2011), *supra* note 130, at 34 (providing one rule for all types of subpoenas).

Notably, this removes the requirement in subsection (C) that subpoenas for documents issue from the court "where the production or inspection is to be made."[133]

This proposed revision greatly simplifies and clarifies the rule. First, introducing a uniform rule for all subpoenas, rather than specifying a different rule for each type of subpoena, provides ease and simplicity.[134] Most importantly, designating the issuing court as the court where the action is pending is unambiguous because there can be no debate as to which court the action is currently pending, even if technology changes, and because such designation removes the current language that causes conflicting interpretations.[135]

Because of the proposed rule's simplicity and unambiguity, the change should be easy for practitioners to understand and to implement.[136] Further, practitioners should not be burdened by issuing a subpoena from the court where the action is pending because they are already dealing with that court and should already be authorized to practice in that court.[137]

B. Nationwide Service of Process Is Permitted

Just as Rule 45(a)(2) is shortened to one sentence,[138] Rule 45(b)(2) is also shortened to one sentence: "A subpoena may be served at any place within the United States."[139] The amendments completely eliminate current Rule 45(b)(2)

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133. *Compare* FED. R. CIV. P. 45(a)(2)(C) (providing the proper court to issue a subpoena is the court "where the production or inspection is to be made"), *with* FED. R. CIV. P. 45(a)(2) (Proposed Amendments 2011), *supra* note 130, at 34 (providing the proper court to issue a subpoena is the court "where the action is pending").

134. *See* FED. R. CIV. P. 45 advisory committee's note (Proposed Amendments 2011), *supra* note 11, at 20 ("The goal of the present amendments is to clarify and simplify the rule."). *Compare* FED. R. CIV. P. 45(a)(2) (specifying different rules depending on the type of evidence subpoenaed), *with* FED. R. CIV. P. 45(a)(2) (Proposed Amendments 2011), *supra* note 130, at 34 (providing one rule for all types of subpoenas).

135. *See supra* Part III.A (outlining various interpretations of Rule 45(a)(2)(C)); *supra* text accompanying notes 130–133 (describing the modifications to Rule 45(a)(2)); *cf. supra* text accompanying notes 110–115 (propounding how changing technology could obscure current interpretations of Rule 45(a)(2)(C)).

136. *See supra* notes 134–135 and accompanying text (reasoning why the proposed amendment is simple and clear).

137. *See* FED. R. CIV. P. 45(a)(3) (providing attorneys may issue subpoenas on behalf of any district court); FED. R. CIV. P. 45 advisory committee's note (Proposed Amendments 2011), *supra* note 11, at 21 ("[S]ubdivision [(a)] is amended to provide that a subpoena issues from the court in which the action is pending. Subdivision (a)(3) specifies that an attorney authorized to practice in that court may issue a subpoena.").

138. FED. R. CIV. P. 45(a)(2) (Proposed Amendments 2011), *supra* note 130, at 3–4.

139. FED. R. CIV. P. 45(b)(2) (Proposed Amendments 2011), *supra* note 130, at 6–7.

subsections (A) through (D).[140] Significantly, this removes subsection (B), which imposes a 100-mile limitation.[141] Further, Rule 45(b)(2) is no longer subject to Rule 45(c)(3)(A)(ii), which currently imposes another 100-mile limitation, because that section's 100-mile limitation has been eliminated as well.[142]

These proposed changes fulfill the goal of simplification by expanding service of process authority to the entire nation, thereby eliminating jurisdictional questions.[143] Also, nationwide service of process is already allowed under other federal rules, so courts and practitioners are already familiar with nationwide service procedure and have developed case law on the issue.[144] Most significant, though, is the removal of the 100-mile limitation.[145] Not only does this removal simplify the subpoena process, it eliminates all the conflicting geographical limits imposed by courts under the current 100-mile limitation.[146]

C. Place of Compliance Is Designated as a Reasonably Convenient Place

Unlike the current rules, the proposed rules specifically designate a place of compliance.[147] The amendments provide for

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140. *Compare* FED. R. CIV. P. 45(b)(2) (allowing service at various places), *with* FED. R. CIV. P. 45(b)(2) (Proposed Amendments 2011), *supra* note 130, at 6–7 (allowing service at any place in the nation).

141. *Compare* FED. R. CIV. P. 45(b)(2) (imposing a 100-mile limitation), *with* FED. R. CIV. P. 45(b)(2) (Proposed Amendments 2011), *supra* note 130, at 6 (imposing no limitations).

142. *Compare* FED. R. CIV. P. 45(b)(2) (subjecting Rule 45(b)(2) to Rule 45(c)(3)(A)(ii)), *with* FED. R. CIV. P. 45(b)(2) (Proposed Amendments 2011), *supra* note 130, at 6 (not subjecting Rule 45(b)(2) to any other rules); FED. R. CIV. P. 45(c)(3)(A)(ii) (imposing a 100-mile limitation), *with* FED. R. CIV. P. 45(d)(3)(A)(ii) (Proposed Amendments 2011), *supra* note 130, at 12–13 (not imposing a 100-mile limitation).

143. *See* FED. R. CIV. P. 45 advisory committee's note (Proposed Amendments 2011), *supra* note 11, at 22 ("Rule 45(b)(2) is amended to provide that a subpoena may be served at any place within the United States, removing the complexities prescribed in prior versions."); Memorandum, *supra* note 2, at 2 ("[T]hese amendments greatly simplify the place-of-service provisions of the current rule . . . ."); *supra* Part IV.A (explaining jurisdictional ambiguities under the current subpoena rules).

144. *See* Memorandum, *supra* note 2, at 2–3 ("The amended rule also parallels Fed. R. Crim. P. 17(e), which provides nationwide service for subpoenas in criminal cases."); *see also, e.g.*, Omni Video Games, Inc. v. Wing Co., 754 F. Supp. 261, 262–63 (D.R.I. 1991) (discussing the scope of nationwide service of process provided by the federal Racketeer Influenced and Corrupt Organizations statute).

145. *See supra* notes 140–142 and accompanying text (describing the modifications to Rule 45(b)(2)).

146. *See supra* Part III.B (outlining various interpretations of Rule 45(b)(2)(B)).

147. *See* FED. R. CIV. P. 45 advisory committee's note (Proposed Amendments 2011), *supra* note 11, at 22–23 (stating the place of compliance rule is new). *Compare* FED. R. CIV. P. 45 (not designating a place of compliance), *with* FED. R. CIV. P. 45(c) (Proposed

a place of compliance in section 45(c) and shift the current section 45(c) provisions to section 45(d).[148] Under the new place of compliance provisions, the 100-mile limitation is retained for subpoenas commanding attendance, but a new, separate rule is created "[f]or [o]ther [d]iscovery."[149] This proposed new rule, Rule 45(c)(2), provides that "[a] subpoena may command . . . production of documents, tangible things, or electronically stored information at a place reasonably convenient for the person who is commanded to produce."[150]

No longer subjecting subpoenas for documents to the 100-mile limitation and creating a specific place-of-compliance provision tailored to documents are vast improvements.[151] These proposed changes recognize that appearing for trial or deposition versus producing a document involve different levels of burden; it may be necessary to protect a nonparty from the burden of long-distance travel to a trial or deposition, but mailing documents long-distance presents a minimal burden.[152] Although such recognition and distinction was either overlooked or disregarded when making the 1991 revisions, the distinction comports with the purposes of the 1991 revisions, which were to protect subpoenaed parties while facilitating access to documents.[153] Under the proposed rules, the nonparty is still protected from any undue burden of producing documents, but the geographical boundaries that currently restrict access to documents are removed.[154]

Amendments 2011), *supra* note 130, at 7–9 (designating a place of compliance).

148. *See* FED. R. CIV. P. 45(c), (d); FED. R. CIV. P. 45(c), (d) (Proposed Amendments 2011), *supra* note 130, at 7–15; FED. R. CIV. P. 45 advisory committee's note (Proposed Amendments 2011), *supra* note 11, at 23.

149. *Compare* FED. R. CIV. P. 45(b)(2)(B), (c)(3)(A)(ii) (imposing a 100-mile limitation on both subpoenas commanding attendance and subpoenas for other types of discovery), *with* FED. R. CIV. P. 45(c) (Proposed Amendments 2011), *supra* note 130, at 7–9 (providing different places of compliance for subpoenas commanding attendance and subpoenas for other types of discovery).

150. FED. R. CIV. P. 45(c)(2) (Proposed Amendments 2011), *supra* note 130, at 7–9.

151. *See supra* text accompanying notes 147–150 (describing the new, proposed place of compliance rule); *infra* text accompanying notes 152–162 (detailing why the proposed rule is a vast improvement).

152. *See supra* text accompanying notes 102–105 (comparing compliance with a subpoena for attendance to compliance with a subpoena for documents).

153. *See* FED. R. CIV. P. 45 advisory committee's note (1991) (stating the purposes of the 1991 revisions); *supra* notes 106–108 and accompanying text (discussing the 1991 revisions to the 100-mile limitation).

154. *See* Part III.B (outlining the various 100-mile limitations currently placed on subpoenas for documents); *supra* text accompanying notes 102–105 (reasoning why it is unnecessary to have a 100-mile limitation to protect parties from undue burden); *infra* notes 156–160 and accompanying text (explaining how the proposed amendments protect subpoenaed parties from undue burden).

Not only was the protection of subpoenaed parties a goal of the 1991 amendments, such protection is still promoted by the rules, courts, and commentators—especially for nonparties.[155] Although the 100-mile limitation on subpoenas for documents is removed, the proposed amendments sufficiently protect subpoenaed parties by requiring compliance at a place reasonably convenient for the subpoenaed party.[156] In other words, nonparties will be able to challenge the validity of a subpoena that requires them to produce documents at an unreasonable place.[157] This flexible, open-ended reasonableness standard is a wise choice because it encompasses the protections of the prior rule while at the same time self-adjusting to different situations and technologies.[158] For example, if a nonparty in Florida is subpoenaed to produce paper copies of twenty boxes of documents to a law firm in Washington, most likely the place of compliance will be deemed not reasonably convenient, and accordingly, the subpoena will be invalid.[159] However, if a nonparty in Florida is subpoenaed to produce the same documents electronically by mailing flash drives to a law firm in Washington, most likely the place of compliance will be deemed reasonably convenient, and accordingly, the subpoena will be valid.[160] Although some might argue that a reasonableness standard is too vague and will lead to litigation, courts and practitioners are accustomed to applying reasonableness standards.[161] In addition, any attempt to make the

155. FED. R. CIV. P. 45 advisory committee's note (1991); *see* sources cited *supra* note 24 (protecting nonparties from undue burden).

156. FED. R. CIV. P. 45(c)(2) (Proposed Amendments 2011), *supra* note 130, at 7–9 (requiring a subpoena for documents to command production at a reasonably convenient place).

157. *See id.* (requiring a subpoena for documents to command production at a reasonably convenient place); FED. R. CIV. P. 45(d)(3)(A)(ii), (iv) (Proposed Amendments 2011), *supra* note 130, at 9–13 (requiring a subpoena that does not comply with Rule 45(c) to be quashed or modified).

158. *See* FED. R. CIV. P. 45 advisory committee's note (Proposed Amendments 2011), *supra* note 11, at 23 ("The provisions on the reasonable place for production are intended to be applied with flexibility, keeping in mind the assurance of Rule 45(d)(1) that undue expense or burden must not be imposed on the person subject to the subpoena."); *cf. supra* Part IV.B (explaining how the current rule is not up-to-date with current technology and why application of the rule to up-and-coming technologies would be problematic).

159. *Cf.* FED. R. CIV. P. 45(c)(2) (Proposed Amendments 2011), *supra* note 130, at 7–9 (providing a subpoena may command production of documents at a place reasonably convenient for the subpoenaed party); FED. R. CIV. P. 45(d)(3)(A)(ii), (iv) (Proposed Amendments 2011), *supra* note 130, at 12–13 (requiring a subpoena that does not comply with Rule 45(c) to be quashed or modified).

160. *Cf.* FED. R. CIV. P. 45(c)(2) (Proposed Amendments 2011), *supra* note 130, at 7–9 (providing production of electronic documents may be commanded at a reasonably convenient place).

161. *See, e.g.*, Andrews v. Columbia Gas Transmission Corp., 544 F.3d 618, 624 (6th Cir. 2008) ("Where the terms of an expressly granted easement are ambiguous, a court

proposed rule more specific or draw distinctions between types of deliveries likely would lead to the same interpretation and adaptability problems as with the current rule.[162]

D. Proper Court to Handle Subpoena-Related Motions Is the Court Where Compliance Is Required

Lastly, the amendments change which court is to handle subpoena-related motions from the court that issues the subpoena to the court where compliance is required under Rule 45(c).[163] This includes motions to enforce, quash, and modify subpoenas.[164]

Unfortunately, the exact place of compliance under proposed Rule 45(c) is ambiguous.[165] Unlike proposed Rule 45(a)(2) that clearly identifies one specific court as the issuing court,[166] proposed Rule 45(c) provides that "[a] subpoena may command . . . production of documents, tangible things, or electronically stored information at a place reasonably convenient for the person who is commanded to produce" without specifically designating the court of compliance.[167] Most likely, the drafters intend the reasonably convenient place of production to be considered the place of compliance because section 45(c) is titled "[p]lace of compliance."[168]

However, even assuming the reasonably convenient place of production is the place of compliance, the proposed rule is still subject to conflicting interpretations for several reasons.[169] First,

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must determine . . . what is reasonably necessary and convenient . . . ."); Marra v. Papandreou, 33 F. Supp. 2d 17, 19 (D.D.C. 1998) ("The central purpose of any forum *non conveniens* inquiry is to ensure that the trial is reasonably convenient . . . .").

162. *Cf. supra* Part IV (explaining problems with the current rule and why it should be changed).

163. FED. R. CIV. P. 45 advisory committee's note (Proposed Amendments 2011), *supra* note 11, at 20, 22–23. *Compare* FED. R. CIV. P. 45(c)(1), (c)(2)(B)(i), (c)(3)(A), (d)(2)(B) (providing the proper court to handle subpoena-related motions is the court that issues the subpoena), *with* FED. R. CIV. P. 45(d)(1), (d)(2)(B)(i), (d)(3)(A), (e)(2)(B) (Proposed Amendments 2011), *supra* note 130, at 9–18 (providing the proper court to handle subpoena-related motions is the court where compliance is required).

164. FED. R. CIV. P. 45(d)(1), (d)(2)(B)(i), (d)(3)(A), (e)(2)(B) (Proposed Amendments 2011), *supra* note 130, at 9, 11–13, 18–19.

165. *See infra* text accompanying notes 166–182 (expounding why the proposed place of compliance is ambiguous).

166. *See supra* Part V.A (evaluating the proposed amendments to Rule 45(a)(2)).

167. FED. R. CIV. P. 45(c)(2)(A) (Proposed Amendments 2011), *supra* note 130, at 8–9.

168. *See* FED. R. CIV. P. 45(c)(2) (Proposed Amendments 2011), *supra* note 130, at 8–9 (titling the section "[p]lace of compliance" and then providing in a subsection that a subpoena for other discovery may command production at a reasonably convenient place).

169. *See infra* text accompanying notes 170–182 (explaining two reasons the proposed rule will be interpreted in various ways).

the use of the word "production" in the current rules has given rise to conflicting interpretations.[170] Courts have interpreted the word "production" in Rule 45(a)(2)(C), which provides that "[a] subpoena must issue . . . from the court for the district where the production or inspection is to be made,"[171] as referring to either the place the documents are located, the location of the person in custody of the documents, or the place the documents will be delivered.[172] Likewise, courts have interpreted the word "production" in Rule 45(b)(2)(B), which provides that "a subpoena may be served . . . within 100 miles of the place specified for . . . production,"[173] as referring to either the location of the documents or the place the documents will be delivered.[174] The proposed rule is at risk of being interpreted in the same various ways because it also uses the word "production."[175] Accordingly, the proper court to handle subpoena-related motions is ambiguous.

Second, the "place" of production[176] may not clearly correspond to a certain court jurisdiction if the nonparty complies with the subpoena electronically.[177] For example, if a nonparty is subpoenaed to produce documents in person at a physical address or via mail to a physical address,[178] then the court with jurisdiction over that physical address is clear. However, if a nonparty is subpoenaed to produce electronically stored documents via electronic transmission to an email address,[179] then the court with jurisdiction over that email address is less clear. What if the email address belongs to an individual who

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170. *See supra* Part III (expanding on the conflicting interpretations of the word "production").

171. FED. R. CIV. P. 45(a)(2)(C).

172. *See supra* Part III.A (describing the various court interpretations of Rule 45(a)(2)(C)).

173. FED. R. CIV. P. 45(b)(2)(B).

174. *See supra* Part III.B (describing the various court interpretations of Rule 45(b)(2)(B)).

175. FED. R. CIV. P. 45(c)(2)(A) (Proposed Amendments 2011), *supra* note 130, at 8–9.

176. *Id.*

177. *See infra* text accompanying notes 178–182 (explaining why the place of production will sometimes not correspond to a certain court jurisdiction).

178. *See, e.g.*, Deployment Med. Consultants, Inc. v. Pipes, No. 08cv1959-JAH (BGS), 2011 WL 811579, at *2 (S.D. Cal. Mar. 2, 2011) (involving a subpoena that required documents to be mailed to a law firm in San Diego).

179. *Cf.* Cenveo Corp. v. S. Graphic Sys., No. 08-5521 (JRT/AJB), 2009 WL 4042898, at *1–2 (D. Minn. Nov. 18, 2009) (requiring a subpoena for electronically stored information be complied with by producing the documents in their native format, which is the default format with metadata intact); Covad Commc'ns Co. v. Revonet, Inc., 260 F.R.D. 5, 6–9 (D.D.C. 2009) (requiring a subpoena for electronic documents be complied with by producing the documents in electronic format, and finding paper printouts of the electronic documents unacceptable).

reads his email from multiple locations? What if the email address belongs to a company with offices across the United States? The proposed rule does not clearly answer these questions. This is a concern because subpoenas are commonly complied with by producing electronically stored information via electronic transmittal.[180] In fact, the rules specifically allow a subpoenaing party to request the form in which the data is to be transmitted, and the data needs to be produced in only one form.[181] Oftentimes, hard copies do not suffice, and the court requires data to be submitted in its original electronic form.[182] In summary, if electronic document delivery is utilized, the place of production may be unclear. As a result, the proper court to handle subpoena-related motions is unclear.

In order to clarify which court is the proper court to handle subpoena-related motions, the word "production," which causes so much ambiguity in the current rules, should be removed from the proposed amendments.[183] In addition, the amendments should clarify which jurisdiction is the place of compliance if documents are electronically submitted to an electronic location.[184]

In the alternative, keeping the current rule that designates the issuing court as the proper court to handle subpoena-related motions[185] would preclude these interpretation and application problems because the proposed

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180. *See* FED. R. CIV. P. 34 advisory committee's note (2006) ("[T]he growth in electronically stored information . . . has been dramatic. . . . [D]iscovery of electronically stored information stands on equal footing with discovery of paper documents."); Gibson, *supra* note 111, at 3 (discussing the rise of electronic discovery and its effects on the discovery process); Stephen D. Williger & Robin M. Wilson, *Negotiating the Minefields of Electronic Discovery*, 10 RICH. J.L. & TECH. 52, PP 35–38 (2004), http://jolt.richmond.edu/v10i5/article52.pdf ("Traditionally, documents only were produced in hard copy format. The nature of digitally maintained information expands available options . . . ."); Christopher Hopkins, *Sending Large PDF Documents by Email*, PALM BEACH B. BULL. 13 (May 25, 2011), *available at* http://www.palmbeachbar.org/downloads/May_11_Bully.pdf ("Adobe PDF has become the default standard for discovery . . . .").

181. FED. R. CIV. P. 34(b)(1)(C), (b)(2)(E)(iii); FED. R. CIV. P. 45(d)(1)(B), (d)(1)(C).

182. *Covad Commc'ns Co.*, 260 F.R.D. at 6–9; *see also* FED. R. CIV. P. 34 advisory committee's note (2006) ("Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible."); Gibson, *supra* note 111, at 3 ("[T]he digital version [of electronic documents] is of more value in the discovery process [than the paper version].").

183. *See supra* text accompanying notes 170–175 (revealing the problem with use of the word "production").

184. *See supra* text accompanying notes 176–182 (revealing how the place of production may not clearly correspond to a certain court jurisdiction).

185. FED. R. CIV. P. 45(c)(1), (c)(2)(B)(i), (c)(3)(A), (d)(2)(B).

amendments clearly designate one issuing court.[186] On the other hand, requiring subpoena-related motions to be filed with the issuing court, which under the proposed amendments is the court in which the action is pending,[187] is not the best solution because it ignores the burden this could place on distant nonparties.[188]

VI. CONCLUSION

In conclusion, the Civil Rules Advisory Committee's recently proposed amendments are a monumental step in the right direction to solving issues with Rule 45's nonparty subpoena procedures. Currently, courts vary significantly in their interpretations of Rule 45(a)(2)(C), which specifies which court can issue a subpoena, and Rule 45(b)(2)(B), which specifies where a subpoena may be served and sets a 100-mile limitation. Most significantly, the proposed amendments resolve these problems by providing a subpoena issue from the court in which the action is pending, allowing nationwide service of process, and requiring subpoena compliance at a place reasonably convenient. In doing so, these changes help achieve the Civil Rules Advisory Committee's goal of simplifying and clarifying Rule 45.[189] Also, these changes are well balanced because they account for different situations and technological advancements while at the same time protecting nonparties from undue burden.[190]

However, a proposed rule designating the court where compliance is required as the proper court to handle subpoena-related motions may be difficult to apply in the context of electronic discovery.[191] In addition, the meaning of the word "production" in the proposed rule is ambiguous and renders it unclear which court should handle subpoena-related

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186. *See supra* Part V.A (describing the proposed amendments to Rule 45(a)(2), which designate the issuing court).

187. FED. R. CIV. P. 45(a)(2) (Proposed Amendments 2011), *supra* note 130, at 3–4.

188. *See* FED. R. CIV. P. 45 advisory committee's note (Proposed Amendments 2011), *supra* note 11, at 24 ("Subpoenas are essential to obtain discovery from nonparties. To protect local nonparties, local resolution of disputes about subpoenas is assured by . . . Rules 45(d) and (e) that motions be made in the court in which compliance is required under Rule 45(c).").

189. FED. R. CIV. P. 45 advisory committee's note (Proposed Amendments 2011), *supra* note 11, at 20; Memorandum, *supra* note 2, at 5; *see supra* Part V (explaining how the proposed amendments simplify and clarify Rule 45).

190. *See supra* text accompanying notes 135, 156–160 (explaining how the proposed amendments resolve the problem with technological advancement).

191. *See supra* text accompanying notes 176–182 (revealing a potential problem with the proposed amendments in the context of electronic discovery).

motions.[192] To clarify this rule, the Civil Rules Advisory Committee should designate a specific place of compliance for electronically delivered documents and remove the word "production."[193]

With these suggested changes incorporated, the proposed amendments would provide practitioners with the definite procedures they currently lack for subpoenaing nonparties for documents. Given the frequent use of such procedures in federal courts,[194] the amendments, if approved for promulgation in 2013,[195] should be a welcomed revision to over twenty years of ambiguous rules.

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192. *See supra* text accompanying notes 170–175 (revealing a potential problem with the word "production" in the proposed amendments).

193. *See supra* text accompanying notes 183–188 (suggesting changes to the proposed amendments).

194. Memorandum, *supra* note 2, at 2.

195. PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF PRACTICE AND PROCEDURE., *supra* note 13.