


July 2015

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Recommended Citation

Oparil, Richard J. (1992) "Procuring Trial Testimony from Corporate Officers and Employees: Alternative Methods and Suggestions for Reform," *Akron Law Review*: Vol. 25 : Iss. 3 , Article 3.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol25/iss3/3>

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PROCURING TRIAL TESTIMONY FROM CORPORATE OFFICERS AND EMPLOYEES: ALTERNATIVE METHODS AND SUGGESTIONS FOR REFORM

by

RICHARD J. OPARIL*

One of the most vexing questions facing civil litigators is how to compel the presence of officers of a corporate party at trial who may not be subject to the subpoena power of the federal court. "[S]ubpoenas requiring the attendance of witnesses at trial cannot be served outside the judicial district more than 100 miles from the place of trial."¹ For example, a corporate plaintiff files an action against a corporate defendant in the United States District Court for the District of Columbia. Venue is proper, even though the defendant's headquarters are located in Los Angeles.² Surprisingly, it is an unresolved question whether the plaintiff may compel the presence of the corporate defendant's officers to testify at trial in D.C.³ The case law on this issue is relatively sparse and inconclusive, and the commentators are largely silent.⁴

This article discusses the situation under the current Federal Rules of Civil Procedure,⁵ including some alternative methods of obtaining testimony at trial. The article then discusses various ways the problem could be solved through rule changes to help ensure live trial testimony by corporate officials.

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¹ *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 231 (1964). The rule is intended "not only to protect witnesses from the harassment of long, tiresome trips but also, in line with our national policy, to minimize the costs of litigation, which policy is strongly emphasized in the Federal Rules of Civil Procedure." *Id.* at 234.

² "[A] corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction. . . ." 28 U.S.C. § 1391(c) (1988).

³ See FED. R. CIV. P. 45(c)(3)(A)(ii) and FED. R. CIV. P. 45(c)(3)(B)(iii), quoted at accompanying notes 12 and 13.

New York is one state that provides for statewide service of process, thereby extending the 100-mile limit. See N.Y. CIV. PRAC. L. & R. §§ 308, 2303 (McKinney's 1991). Certain federal statutes broaden a federal court's subpoena power in civil cases. See, e.g., 15 U.S.C. § 23 (1982).

⁴ See 5A MOORE'S FEDERAL PRACTICE ¶ 45.09 (1991). Cf. Bucklo, *Can a Party Be Required to Attend Trial?*, 14 LITIGATION 33, 34 (Spring 1988).

⁵ See *infra* notes 10-13 and accompanying text.

THE PRESENT SITUATION

Rule 45

The current design of the Federal Rules provides for broad and nationwide discovery, while curiously limiting, essentially through geographic location, the ability of parties and the court to require attendance and live testimony at trial. The 100-mile limit in Rule 45 can be traced to the Federal Judiciary Act of 1789, passed by the First Congress.⁶ Section 30 of that Act provided in part:

[W]hen the testimony of any person shall be necessary in any civil cause pending in any district in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient or very infirm, the deposition of such person may be taken *de bene esse* before any justice or judge of any of the courts of the United States. . . .⁷

Congress later added a 100-mile limit for subpoenas out of a judicial district:

[S]ubpoenas for witnesses who may be required to attend a court of the United States, in any district thereof, may run into another district: *Provided*, [t]hat in civil causes, the witnesses living out of the district in which the court is holden, do not live at a greater distance than one hundred miles from the place of holding the same.⁸

Under the current scheme, a witness must be personally served with the subpoena within the geographic limitations of the Federal Rules whether he or she is the employee of a party or a nonparty. If not, the subpoena is invalid.⁹

On April 30, 1991, the Supreme Court transmitted to Congress certain changes to the Federal Rules of Civil Procedure, including a revised version of

⁶ For a general discussion of the historical background of the geographic limitation on the subpoena power, see Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 MINN. L. REV. 37 (1989).

⁷ Judiciary Act, ch. 20, § 30, 1 Stat. 73, 88 (1789).

⁸ Judiciary Act, ch. 22, § 6, 1 Stat. 333, 335 (1793).

⁹ See, e.g., *Blum v. Housewright*, 113 F.R.D. 676 (D. Nev. 1987) (witness who lived outside the district and more than 100 miles from the courthouse was not subject to subpoena in a civil action); *Lyles v. Beto*, 32 F.R.D. 248 (S.D. Tex. 1963) (motion for subpoena denied where individuals did not reside within 100 miles of the place of hearing or trial); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE (CIVIL) § 2459 (1971) (subpoena in a civil action may be served within the district or 100 miles from the place of hearing or trial).

Rule 45.¹⁰ The new rules took effect December 1, 1991. Those revisions do not directly address the problem of obtaining subpoena power over officers of a corporate party who are outside of the judicial district. However, the new Rule 45(b)(2) provides in part:

Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.¹¹

New Rule 45(c)(3)(A)(ii) provides that a court may quash or modify a subpoena it issued if the subpoena:

requires a *person who is not a party or an officer of a party* to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held. . . . (Emphasis added.)¹²

¹⁰ 111 S. Ct. 945, 945-63 (1991).

¹¹ FED. R. CIV. P. 45(b)(2). Prior to December 1, 1991, FED. R. CIV. P. 45(e)(1) provided that:

A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena, or at a place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place where the district court is held. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

FED. R. CIV. P. 45(e)(1). The Advisory Committee Note to the 1980 Amendment noted that:

The amendment makes the reach of a subpoena of a district court at least as extensive as that of the state courts of general jurisdiction in the state in which the district court is held. . . . No reason appears why it should be less, as it sometimes is because of the accident of district lines. Restrictions upon the reach of subpoenas are imposed to prevent undue inconvenience to witnesses. State statutes and rules of court are quite likely to reflect the varying degrees of difficulty and expense attendant upon local travel.

FED. R. CIV. P. 45(e)(1) (1980) (Advisory Committee Note).

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FED. R. CIV. P. 45(e)(3)(A)(ii).

Finally, new Rule 45(c)(3)(B)(iii) states that if a subpoena:

requires a *person who is not a party or an officer of a party* to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions. (Emphasis added.)¹³

These rule changes essentially left the geographic limitations on trial subpoenas intact.

Trial Subpoenas for Corporate Employees

The 100-mile test becomes more complicated when a party to litigation seeks to compel the testimony of its opponent's employee at trial. One early circuit court case wrote:

We know of no legal duty imposed upon a corporation to produce its officer as a witness when the process of the court cannot reach him. . . . We know of no legal duty imposed upon an officer of a corporation to appear as a witness against that corporation, except in obedience to the writ of subpoena of a court duly served upon him. We know of no power in the corporation or any duty devolving upon it, to compel its officer to appear as a witness before a court. We know of no right in a court to compel a corporation to produce its officer as an adverse witness. The law furnishes ample machinery to procure the testimony of any witness, in the service of its writ and by proceedings for contempt for disobedience of the writ, or, if the witness is beyond the jurisdiction of the court, by deposition or upon commission.¹⁴

Another court wrote that a "defendant cannot be required to produce its employee as a witness. . . . There is no authority to require the witness' attendance save through subpoena."¹⁵ The following cases illustrate the application of this notion.

¹³ FED. R. CIV. P. 45(c)(3)(B)(iii).

¹⁴ Cent. Grain & Stock Exch. v. Bd. of Trade, 125 F. 463, 468 (7th Cir. 1903).

¹⁵ Czuprynski v. Shenango Furnace Co., 2 F.R.D. 412, 412-13 (W.D.N.Y. 1942); see also Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 89 F.R.D. 497, 501 (C.D. Cal. 1981) ("Witnesses may not be compelled to attend trial unless they can be served with subpoenas within the trial district, or at any place outside of the district that is within 100 miles of the place of trial. FED. R. CIV. P.

*Babcock & Wilcox Co. v. Foster Wheeler Corp.*¹⁶ involved a patent interference proceeding pending before the Patent Office. Babcock & Wilcox moved the court for an order requiring the co-inventor of the disputed patent application to appear and give testimony. Babcock & Wilcox had been unable to serve the inventor with a subpoena¹⁷ and Foster & Wheeler refused to voluntarily produce the witness.¹⁸ The motion compelling attendance and testimony was denied.¹⁹ The court reasoned that:

Nowhere . . . do the Federal Rules authorize the district court to command the presence of a witness at a hearing or trial without his first being served with a valid subpoena. . . . There is no provision in Rule 45 or the Federal Rules of Civil Procedure generally for ordering the attendance of a witness who by ingenious or ingenuous tactics manages to avoid the subpoena server. . . . [A]ttendance of reluctant, non-party witnesses at deposition or trial is wholly dependent upon subpoena power. . . . Because the subpoena power of the Court has not been called into play the Court is entirely without jurisdiction to order whatever sanction might be appropriate had [the co-inventor] been validly served with a subpoena. . . .²⁰

In *Jaynes v. Jaynes*,²¹ the district court dismissed the pro se civil rights case based on improper venue. However, in affirming, the Second Circuit found that even if venue was proper, there was not service of process necessary to acquire personal jurisdiction. Moreover, the district court could not have used its subpoena power to compel the more than 30 defendants to appear. "[T]his is a civil case in which appellant seeks to have the district court subpoena parties who reside in Texas or other parts of the country more than 100 miles from any place within the Northern District of New York for the purpose of obtaining jurisdiction over them. The district court has no power to subpoena these parties. . . ."²²

In *Merchant Bank of New York v. Grove Silk Co.*,²³ the defendant served a subpoena on a vice president of the plaintiff-bank. The trial would take place in Scranton, Pennsylvania, but the subpoena was served in New York City -- a distance exceeding 100 miles. The court quashed the subpoena.²⁴

¹⁶ 174 U.S.P.Q. (BNA) 145 (D.N.J. 1972).

¹⁷ 35 U.S.C. § 24 (1988) provides that the district court clerks shall issue a subpoena for any witness residing or being in that district, in connection with a contested proceeding before the Patent Office. The provisions of the Federal Rules of Civil Procedure apply regarding the attendance of witnesses.

¹⁸ *Babcock & Wilcox*, 174 U.S.P.Q. (BNA) at 147-48.

¹⁹ *Id.* at 149.

²⁰ *Id.* at 150 (footnotes omitted).

²¹ 496 F.2d 9 (2d Cir. 1974).

²² *Id.* at 10.

²³ 11 F.R.D. 439 (M.D. Pa. 1951).

²⁴ *Id.* at 440.

It is clear that a court cannot compel an individual who is beyond the court's Rule 45 subpoena power to testify at trial as an individual. But can the argument be made that the court has power to compel the corporation to testify at trial through such an individual? A party does have a right to call an adverse *party* as a witness in a civil trial.²⁵ But where that adverse party is a corporation, it can testify only through its personnel. The real problem occurs when specific individuals are not within the subpoena power of the federal district court where the trial is to occur.

"A corporation, as an artificial entity, must be called to testify through its representatives."²⁶ Rule 611(c) of the Federal Rules of Evidence incorporated the provisions of former Fed. R. Civ. P. 43(b) (abrogated in 1972) which stated that "[a] party may call an adverse party or an officer, director, or managing agent of a public or private corporation . . . which is an adverse party. . . ."²⁷ Although the language of former civil Rule 43(b) and evidence Rule 611(c) differ, Rule 611(c) was intended at least to allow a party to call those witnesses who could be called under former Rule 43(b).²⁸ Where discovery has established which officers, directors, or managing agents of a corporation have knowledge of the relevant facts, the corporation should be required to testify at trial as an adverse party through those particular individuals. That the relevant officials of the corporate defendant happen to be located outside the court's jurisdiction should not interfere with a party's right to call the adverse party corporation as a trial witness, because the forum court has power to compel the party to testify through its relevant officials. The argument does not turn on whether the court has power to subpoena *individuals* from outside its jurisdiction to testify as individuals but, rather, that the court has power to compel the *corporate party* to testify through particular officers, directors, and managing agents, by means of a subpoena served on the corporation to testify through the designated officials.²⁹ While logical and persuasive, most courts have not adopted this argument.

²⁵ See, e.g., *Degelos v. Fidelity and Cas. Co. of N.Y.*, 313 F.2d 809, 814-15 (5th Cir. 1963) (former Rule 43(b) granted the right to call an adverse party as a witness); *Mathews v. Hines*, 444 F. Supp. 1201, 1208 (M.D. Fla. 1978); F. LANE, *LANE'S GOLDSTEIN TRIAL TECHNIQUE* § 11.82 (3d ed. 1986); C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE (CIVIL)* § 2413, at 368-70 (1971).

²⁶ F. LANE, *supra* note 25.

²⁷ C. WRIGHT & A. MILLER, *supra* note 25, at 306.

²⁸ See 10 MOORE'S *FEDERAL PRACTICE* 611.05[6]-[9] (2d ed. 1988).

²⁹ The *MANUAL FOR COMPLEX LITIGATION* notes that:

Special problems may arise when counsel attempt to call adverse parties or their employees as witnesses. Of course, such persons can be called to testify if present at the trial, whether voluntarily or by reason of a subpoena under Fed. R. Civ. P. 45. Arrangements may usually be made among counsel to have these persons present, if adequate notice is given, at the requested time without the need for a subpoena or even if not subject to subpoena. Sometimes, however, a party is unwilling to make available employees who are beyond the subpoena powers of the court. Despite the substantial interference with the conduct of the trial it may cause, this declination appears to be permissible under current rules if such persons will not be present during any part of the trial. In some circumstances, however, courts have used their discretion under Fed. R. Evid. 611 to preclude parties who

For instance, in *DeFelice v. A.G. Edwards & Sons*,³⁰ plaintiff-investors filed suit in New Orleans against Edwards, a brokerage firm based in St. Louis that had a branch office in New Orleans. The federal court in Louisiana granted the motion to compel Edwards to testify in plaintiffs' case through particular Edwards' executives who lived and worked in St. Louis.³¹

In *Cipollone v. Liggett Group, Inc.*,³² a tobacco products liability case, the plaintiff sought to obtain the trial testimony of Dey, an officer of defendant-Liggett, a non-resident of New Jersey and not subject to the geographic subpoena power of the court. Plaintiff "served" the witness through Liggett's registered agent and Liggett's former parent corporation.³³ Dey was previously designated as a Rule 30(b)(6) witness by Liggett and testified for three days. The court held that the designation as a deposition witness does not constitute any waiver of an objection to that witness' appearance at trial.³⁴ The court went on to rule that the service on the registered agent and former parent was insufficient to compel Dey's appearance at trial.³⁵ Plaintiff then requested the opportunity to take a new videotaped deposition of Dey.³⁶ That request was denied -- because the trial was in progress and no application was made earlier -- but it was noted that: "The Court, however, in view of the defendant's refusal to produce Mr. Dey voluntarily, has indicated that if he is not produced, the Court will consider permitting the jury to draw some adverse inference from the fact that he has not been produced."³⁷

*In re Nucorp Energy Securities Litigation*³⁸ is distinguishable. There, the court ordered an officer of Donaldson, Lufkin & Jenrette Securities Corp. ("DLJ") to appear at trial even though he had not been served personally with a trial subpoena. When DLJ decided not to bring the officer to testify, the trial judge sanctioned DLJ by striking its answer and entering a default judgment.³⁹ This ruling may, however, have limited significance because the DLJ officer was, in

refuse to honor a reasonable request for production of a key witness subject to their control, and thereby force an opponent to use a deposition, from calling the witness to testify personally during their presentation of evidence. (Footnotes omitted.)

MANUAL FOR COMPLEX LITIGATION SECOND § 22.23 (1985).

³⁰ No. 82-4705 (E.D. La. 1982) (order granting motion to compel testimony).

³¹ *Id.*

³² No. 83-2864(SA) (D.N.J. Jan. 27, 1988).

³³ Transcript of Proceedings at 735, *Cipollone v. Liggett Group, Inc.*, No. 83-2864 (Feb. 3, 1988).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 747.

³⁷ *Id.* at 956.

³⁸ Multidistrict Litigation 514 No. 87-6673 (S.D. Cal. 1987).

³⁹ DLJ's writ of mandamus to vacate the default was denied by the Ninth Circuit. *Donaldson, Lufkin & Jenrette Securities Corp. v. United States Dist. Court for the S. Dist. of Cal.*, No. 87-6673 (9th Cir. 1987) (overruling writ of Mandamus).

fact, a resident of California, and was amenable to service. Moreover, before the court issued its order to produce the officer, DLJ had listed the employee as a witness and told the court that it had control over and could produce the prospective witness.⁴⁰

Most courts have ruled that Rule 45(e)(1) applies to trial subpoenas addressed to parties as well as to non-parties. These cases conclude that a party cannot be required to appear at trial if it cannot be subpoenaed under Rule 45(e)(1).⁴¹ In *Steel, Inc. v. Atchinson, Topeka and Santa Fe Railway Company*,⁴² certain shippers, for the most part located outside Kansas, sued a number of railways in Kansas federal court. The defendants sought to compel plaintiffs' representatives to testify at trial under former Rule 43(b), the predecessor of Evidence Rule 611(c). The court declined to issue the requested subpoenas, holding that Rule 43(b) did not itself establish any right to call an adverse party as a witness, but only prescribed the manner of examination once an adverse party was validly subpoenaed under Rule 45.⁴³ The court did not expressly consider whether the defendants could have compelled the corporate plaintiff itself to testify through its officers, directors or managing agents.

Another possible argument is that federal courts have "inherent power" to compel testimony by party representatives. There is no doubt that, in general, district courts "have inherent powers, rooted in the chancellor's equity powers, 'to process litigation to a just and equitable conclusion.'"⁴⁴ The judiciary is "free, within reason, to exercise this inherent judicial power in flexible and pragmatic

⁴⁰ Transcript of Proceedings at 3746, *In re Nucorp Energy Securities Litigation* (S.D. Cal. 1987) (No. 87-6673). Cf. *Societe Internationale v. Rogers*, 357 U.S. 197, 206-07 (1958) (court's authority to dismiss a complaint because of noncompliance with a discovery order derives from FED. R. CIV. P. 37 rather than from "inherent power").

⁴¹ See *GFI Computer Indus., Inc. v. Fry*, 476 F.2d 1, 5 (5th Cir. 1973) ("[t]he court had no power to force a civil defendant outside its subpoena jurisdiction to appear personally at the trial and then submit to examination"); *Standard Metals Corp. v. Tomlin*, Fed. Sec. L. Rep. (CCH) ¶ 98,644 (S.D.N.Y. 1982) (denying motion to compel attendance by defendants at trial, citing *Fry*); *In re Champion Int'l Corp.*, No. 88-5050 (8th Cir. Feb. 10, 1988) (LEXIS, Genfed Library, Dist file) (granting petition for writ of mandamus or prohibition; district court was without authority to direct Champion's C.E.O. and Senior Vice President to travel from Connecticut to Minnesota to appear at trial). See also *Wells v. Rushing*, 755 F.2d 376, 380-81 n.5 (5th Cir. 1985) ("Of course, we do not hold that there is an absolute requirement that a defendant in a civil case attend trial. Our reasoning is therefore consistent with that in [*Fry*]").

In *Hecht v. Don Mowry Flexo Parts, Inc.*, 111 F.R.D. 6, 11 (N.D. Ill. 1986), the court held that a subpoena duces tecum issued to a corporate defendant located outside the court's Rule 45(e)(1) subpoena power was invalid, because the Rule applied to parties as well as non-parties.

⁴² 41 F.R.D. 337 (D. Kan. 1967).

⁴³ "There is nothing in that rule [43(b)] which would imply a right of the examining party to require the presence at trial of one not otherwise amenable to the subpoena provisions of [Rule 45]." *Id.*

⁴⁴ *HMG Property Investors, Inc. v. Parque Indus. Rio Canas, Inc.*, 847 F.2d 908, 915 (1st Cir. 1988) (quoting *ITF Community Development Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978)).

ways."⁴⁵ For example, federal courts have broad and inherent powers to stay proceedings:

[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.⁴⁶

This inherent power principle was applied in *Brockton Savings Bank v. Peat, Marwick, Mitchell & Co.*⁴⁷ There, the court held that a trial court has power to enter a default judgment against a defendant who disobeyed the court's order to bring two corporate officials who lived outside the court's subpoena power to a hearing concerning the defendant's alleged fraud on the court.⁴⁸ The First Circuit observed that "[i]f one begins with the assumption that [the trial] court's order . . . is in reality a 'subpoena requiring the attendance of a witness at a hearing or trial' pursuant to Rule 45, the cases . . . make clear that a court cannot force the appearance at a hearing or trial of a witness beyond the court's subpoena powers."⁴⁹ Nonetheless, the First Circuit found the trial court's inherent powers sufficient to justify the order. The court reasoned that "the rules of civil procedure do not completely describe and limit the power of district courts. . . ."⁵⁰

Other courts reject this approach. One state court clearly held that "[i]n civil proceedings the court has no inherent power to order the physical presence of a litigant other than as a witness."⁵¹ In *Strandell v. Jackson County*,⁵² the court acknowledged that "a district court no doubt has substantial inherent power to control and manage its docket."⁵³ However, in holding that the district court lacked the power to compel litigants to participate in a summary jury trial,⁵⁴ the Seventh Circuit pointed out:

That [inherent] power must, of course, be exercised in a manner that is in harmony with the Federal Rules of Civil Procedure. Those rules

⁴⁵ *Id.* at 916.

⁴⁶ *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936).

⁴⁷ 771 F.2d 5 (1st Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986).

⁴⁸ *Id.* at 12.

⁴⁹ *Id.* at 10.

⁵⁰ *Id.* at 11.

⁵¹ *Armstrong v. Hooker*, 135 Ariz. 358, 360, 661 P.2d 208, 210 (Ariz. App. 1982) (since the trial court had no power to compel a person's attendance as a witness, it had no power to compel his attendance at trial as a party).

⁵² 838 F.2d 884 (7th Cir. 1987).

⁵³ *Id.* at 886 (citations omitted).

⁵⁴ See generally Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 386 (1986).

are the product of a careful process of study and reflection designed to take "due cognizance both of the need for expedition of cases and the protection of individual rights." S. Rep. No. 1744, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Admin. News 3023, 3026. That process . . . also reflects the joint responsibility of the legislative and judicial branches of government in striking the delicate balance between these competing concerns. . . . Therefore, in those areas of trial practice where the Supreme Court and the Congress, acting together, have addressed the appropriate balance between the needs for judicial efficiency and the rights of the individual litigant, innovation by the individual judicial officer must conform to that balance.⁵⁵

In other words, district courts may not override express provisions of the Federal Rules using the rubric of "inherent powers."⁵⁶

In most cases, therefore, a litigant cannot be assured that officials of a corporate party will be compelled to testify if they reside beyond the court's power to subpoena them as individuals. There are, however, strategies available that may provide at least some relief from a negative result.

ALTERNATIVES TO OBTAIN TRIAL TESTIMONY

Currently, there are ways to solve or minimize the problem of securing testimony from a corporate opponent's personnel. As will be seen, none is fully satisfactory. The major disadvantage is that each requires counsel to anticipate the problem at a relatively early stage in the litigation and to act on that knowledge. The failure to do so may mean that relevant testimony is unobtainable at trial.

File the Action Where the Defendant's Employees Are Located

A plaintiff could always file her action in a district where she believes the relevant personnel from the defendant corporation are amenable to that court's subpoena power. But this may be an impractical solution. First, the plaintiff may be forced to sue in a locale far from her residence, thereby aggravating the burden and expense of litigating. It may also give the defendant a "home town" advantage -- a factor that could be of particular importance in jury trials. Second, at least in complex litigation, a plaintiff rarely will be in a position prior to filing the complaint of knowing with certainty which of the defendant's personnel should be called in the affirmative case at trial. Generally, discovery is first necessary. Third, if the defendant has several business locations, there may be no single court that would have subpoena power over all the personnel to be called at trial.⁵⁷

⁵⁵ 838 F.2d at 886-87 (citations omitted).

⁵⁶ *Cf. Societe Internationale v. Rogers*, 357 U.S. 197, 206-07 (1958).

Consequently, the ability to subpoena important witnesses for trial should be considered before the lawsuit is filed. But, as indicated, this problem can not be satisfactorily resolved at this stage.

Use Depositions as the Alternative to Live Testimony

Another potential solution is to depose the corporate executives and then read the transcripts (or show the videotaped deposition⁵⁸) at trial.⁵⁹ A federal court will, upon application, issue a subpoena to any person located in the court's jurisdiction for a discovery deposition in that jurisdiction. The procedure is relatively straightforward:

Rule 45(d)(1) provides that service of notice to take a deposition, as required to be given to all other parties by Rules 30(b) and 31(a), constitutes sufficient authorization "for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas" including provisions for the inspection and copying of designated documents. The scheme of Rule 45 therefore permits a litigant to obtain a deposition subpoena in any district court of the United States regardless of where the principal litigation is pending, a discovery opportunity well established. . . . The only express limitations on nationwide discovery via deposition are that, first, the deposition must be taken in the district of the issuing court, and second, a

⁵⁸ See *Mark IV Properties, Inc. v. Club Development & Mgt. Corp.*, 12 Bankr. 854 (Bankr. S.D. Cal. 1981) (discussing use of videotaped depositions in bench trial); FED. R. CIV. P. 30(b)(4) ("The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.").

⁵⁹ FED. R. CIV. P. 32(a) provides in part:

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(2) The deposition of a party or of anyone who, at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

witness may only be compelled to attend a deposition within the geographic constraints of 45(d)(2).⁶⁰

But this approach has practical problems. It is often difficult to convey to jurors, through the reading of a deposition, aspects of the witness' demeanor that may be critical. "There is a strong preference for live testimony, long recognized by the courts, as it provides the trier of fact the opportunity to observe the demeanor of the witness. As Judge Learned Hand stated, '[t]he deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand.'"⁶¹ Moreover, while reading excerpts from depositions may be more efficient than live direct and cross examination, it can bore a jury quickly. "Depositions, deadening and one-sided, are a poor substitute for live testimony especially where vital issues of fact may hinge on credibility."⁶² A deposition taken early in the litigation may not cover all the issues that emerge as important for trial. Likewise, the examiner may not have had the benefit of information which was discovered later in the proceeding which could have broadened or sharpened the questioning.

Move to Transfer the Case

From the defendant's perspective, moving for transfer under 28 U.S.C. § 1404(a) might be one way to help ensure access to a plaintiff corporation's out-of-district witnesses.⁶³ That section provides that "[f]or the convenience of

⁶⁰ *In re Guthrie*, 733 F.2d 634, 638 (4th Cir. 1984) (citations omitted) (subpoena was properly quashed when service was made outside the state and beyond the 100 miles).

In *Nippondenso Co., Ltd. v. Denso Distributors*, No. 86-3982 (E.D. Pa. Sept. 21, 1987)(LEXIS, Genfed Library, Dist file), the court ordered plaintiff to produce for deposition Mr. Totani, a retired executive, but who had a continuing connection to the plaintiff corporation. "[B]y reason of Mr. Totani's former and continuing association with corporate entities over which plaintiff has majority controlling interests, plaintiff clearly has the power to produce Mr. Totani in this district for his deposition." *Id.* at 8553.

⁶¹ *United States v. Int'l Business Machines Corp.*, 90 F.R.D. 377, 381 (S.D.N.Y. 1981), quoting *Napier v. Bossard*, 102 F.2d 467, 469 (2d Cir. 1939). See, e.g., *Bally Manufacturing Corp. v. Kane*, 698 F. Supp. 734, 739 (N.D. Ill. 1988) ("The live testimony of material non-party witnesses is preferred."); *San Shoe Trading Corp. v. Converse Inc.*, 649 F. Supp. 341, 347 (S.D.N.Y. 1986) ("live witnesses are preferred to the deposition testimony that can be used in their absence"); *Walter E. Heller & Co. v. James Godbe Co.*, 601 F. Supp. 319, 322 (N.D. Ill. 1984) ("use of depositions would not be an adequate substitute for live testimony where credibility of the witnesses is important"); *Hotel Constructors, Inc. v. Seagrave Corp.*, 543 F. Supp. 1048, 1051 (N.D. Ill. 1982) ("It is well settled that the trier of fact should not be forced to rely on deposition evidence when the deponent's live testimony can be procured.").

⁶² *Polaroid Corp. v. Casselman*, 213 F. Supp. 379, 382 (S.D.N.Y. 1962).

⁶³ Federal law also provides for transfer and consolidation of multidistrict litigation:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." While "[g]enerally a plaintiff's choice of forum is entitled to considerable weight,"⁶⁴

in deciding whether the convenience of the witnesses justifies transfer under § 1404(a), the court also should consider whether the potential witnesses can be compelled to testify in either the transferor or transferee district.⁶⁵

Brant Point involved a zoning application for property in North Carolina, brought in Massachusetts by a Massachusetts corporation against individuals residing in North Carolina. On a motion to transfer, the court noted that it would be unlikely that many witnesses in North Carolina would be subject to subpoena by the Massachusetts district court.

[A] trial in Massachusetts would consist substantially of the reading of deposition transcripts. . . . [S]uch a result is unacceptable when the action can be transferred to a district where attendance can be compelled and live testimony can be presented to the jury.⁶⁶

The case was transferred to the Western District of North Carolina.

In *Anchor Savings Bank*,⁶⁷ the court transferred the case to another district more convenient for the majority of witnesses with first-hand knowledge.⁶⁸ The court listed some relevant considerations for transfer as including "convenience of parties and witnesses; the relative ease of access to evidence, availability of compulsory process, and cost of obtaining witnesses; where the case may be tried most efficiently and expeditiously; and the interests of justice. . . ."⁶⁹

In another case, Judge Pollak granted a motion to transfer where:

The potential difficulty in trying plaintiff's suite here is compounded, however, by the fact that the court could not compel the attendance of

28 U.S.C. § 1407(a). See, e.g., *In re Air Crash Disaster at John F. Kennedy Int'l Airport of June 24, 1975*, 407 F. Supp. 244 (J.P.M.D.L. 1976) (multiple actions transferred under § 1407(a) to the Eastern District of New York, the district in which the crash occurred and where most of the key witnesses were located).

⁶⁴ *Anchor Savings Bank v. Transamerica Ins. Co.*, 634 F. Supp. 398, 399 (S.D.N.Y. 1986).

⁶⁵ *Brant Point Corp. v. Poetzsch*, 671 F. Supp. 2, 4 (D. Mass. 1987).

⁶⁶ *Id.* at 5.

⁶⁷ 634 F. Supp. 398 (S.D.N.Y. 1986).

⁶⁸ The court wrote: "Since it appears that trial of this case in the Western District would be more convenient for the great majority of witnesses with firsthand knowledge, and since that district has considerably more connection with the operative facts than this district, it is in the interest of justice to transfer the action there for trial." *Id.* at 401.

⁶⁹ *Id.* at 399. Published by IdeaExchange@UAKron, 1992

witnesses or the production of documents under the subpoena power given under the Federal Rules of Civil Procedure. Even minor disputes between the parties during discovery would be aggravated not only by geography, but by the court's inability under the Federal Rules to compel appropriate trial preparation should the need arise.⁷⁰

Conrail claimed in part that the case should be transferred to the district where the accident at issue occurred because witnesses -- including its own employees -- would be outside the subpoena power of the Eastern District of Pennsylvania.⁷¹

Similarly, in *Jadair, Inc. v. Van Lott, Inc.*,⁷² the court recognized that "[a] plaintiff by its choice of forum should not be permitted to force its opponent to try a case by deposition."⁷³ The court went on to explain that "in considering the factor of witnesses not subject to the court's subpoena power, the court must evaluate which of the witnesses will have material and significant testimony. . . ."⁷⁴

Another illustration of a trial court's use of the transfer device to obtain live testimony of witnesses is found in *Moore v. Velsicol Chemical Corp.*⁷⁵ In that wrongful death diversity case, the plaintiff alleged that the decedent contracted cancer as a result of exposure to chemical pesticides manufactured by the defendant.⁷⁶ Both the plaintiff and decedent were Connecticut residents, and plaintiff sought to establish liability under Connecticut statutory product liability law.⁷⁷ Defendant was an Illinois resident. The defendant moved to transfer the case to Connecticut arguing, among other things, that "transfer would increase the accessibility of witnesses and documentary proof. . . ."⁷⁸ The court agreed and granted the motion, writing that:

[T]he Court believes that transfer of this case would better enable the parties to obtain deposition testimony and adduce more live testimony at trial than would be the case if the action remained in this district. It is clear that many witnesses significant to the defendant's case --

⁷⁰ *Walker v. Consolidated Rail Corp.*, No. 87-4624 (E.D. Pa. Jan. 13, 1988) (LEXIS, Genfed Library, Dist file).

⁷¹ *Id.* Slip op. at 2.

⁷² 512 F. Supp. 1141 (E.D. Wis. 1981).

⁷³ *Id.* at 1145.

⁷⁴ *Id.*

⁷⁵ No. 80-C0450 (N.D. Ill. June 18, 1980) (LEXIS, Genfed library, Dist file).

⁷⁶ *Id.* Slip op. at 2.

⁷⁷ *Id.*

prescribing and treating physicians of the deceased, his co-workers, and fellow members of the trade association to which he belonged -- are more likely to be found in Connecticut than in this district.⁷⁹

*Hotel Constructors*⁸⁰ similarly ordered transfer, in part based on "the primary concern of insuring whenever possible the live presence of these material non-party witnesses."⁸¹ The Supreme Court seems to approve of this approach. In a *forum non conveniens* case, the Court wrote:

Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants. Nor is it necessarily cured by the statement of plaintiff's counsel that he will see to getting many of the witnesses to the trial and that some of them "would be delighted to come to New York to testify." There may be circumstances where such a proposal should be given weight. In others, the offer may not turn out to be as generous as defendant or court might suppose it to be. Such matters are for the District Court to decide in exercise of a sound discretion.⁸²

The Court ruled that the District Court for the Southern District of New York did not exceed its discretion in dismissing the case.⁸³

Thus, if a defendant needs the live testimony of important witnesses subject to another court's subpoena power, the defendant should consider moving for transfer. There is one cautionary note: transfer in order to obtain access to testimony by one party may, of course, hinder the ability of the other party to obtain testimony from officers of the defendant or others. From the plaintiff's perspective, transfer should be denied where it would result in the loss of ability to compel final attendance of witnesses.

The case of *Los Angeles Memorial Coliseum Commission v. National Football League*⁸⁴ was an antitrust action arising out of the proposed move of the Oakland Raiders football team to Los Angeles. The NFL moved for transfer, essentially based on grounds of juror prejudice and pretrial publicity.⁸⁵ In

⁷⁹ *Id.* Slip op. at 4. The court noted that the parties conceded that relevant documents could be secured regardless of where the case is tried.

⁸⁰ 543 F. Supp. 1048, 1052 (N.D. Ill. 1982).

⁸¹ *Id.* at 1051. See also *Walter E. Heller & Co. v. James Godbe Co.*, 601 F. Supp. 319, 322 (N.D. Ill. 1984) ("unavailability of . . . material non-party witnesses weighs heavily in favor of transfer").

⁸² *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947).

⁸³ *Id.*

⁸⁴ 89 F.R.D. 497 (C.D. Cal. 1981).
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⁸⁵ *Id.*

assessing the convenience of witnesses, termed "the most important factor in passing on a transfer motion,"⁸⁶ "courts consider the effect of a transfer on the availability of certain witnesses, and their live testimony at trial."⁸⁷ Thus, transfer may be denied where witnesses reside in the forum district or are within that court's subpoena power.⁸⁸ Many of the plaintiff's and defendants' witnesses were located in the Central District of California. The NFL did not contend that a transfer was necessary for the convenience of any of its witnesses. This factor provided "additional support" for denial of their transfer motion.⁸⁹

A similar situation was created by transfer in *Moore*,⁹⁰ but the court did not regard the problem in that case as being significant:

[P]laintiff contends that corporate witnesses essential to her case are likely to be found within this district. If the action remains in this Court, defendant would not be able to compel by subpoena either the discovery of the Connecticut witnesses or their appearance and testimony at trial. If, however, the case is transferred to Connecticut, defendant obviously would be able to compel the live testimony of many of those witnesses. Conversely, although plaintiff might not be able to compel the live testimony of defendant's corporate officers, it will be able to compel by subpoena the deposition testimony of these witnesses.⁹¹

The court based its reasoning on the fact that without the Connecticut witnesses, the defendant chemical company would be unable to establish its defense of lack of causation, while the plaintiff could prove the facts it needed from deposition testimony and documentary evidence.⁹² Obviously, such a rationale seems to favor the defense and may prove to be highly inequitable to the party unable to use live witnesses at trial.

The court attempted to solve this dilemma in *A.P.T., Inc. v. Quad Environmental Technologies Corp.*⁹³ The court first noted that some witnesses -- "principals" of parties to the suit -- would be outside the subpoena power of the court to which the case would be transferred.⁹⁴ It thus granted defendant's transfer motion, but conditioned transfer on the defendant's willingness to "make

⁸⁶ *Id.* at 501.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See *supra* notes 75-77 and accompanying text.

⁹¹ *Moore v. Velsicol Chemical Corp.*, No. 80-C0450 (N.D. Ill. June 18, 1980) (LEXIS, Genfed library, Dist file).

⁹² *Id.*

⁹³ 698 F. Supp. 718 (N.D. Ill. 1988).

⁹⁴ *Id.* at 724.

available for trial in California those of its employees who [plaintiff] reasonably believes are necessary to prosecute its claims."⁹⁵

In sum, then, each of these alternative tactics⁹⁶ has shortcomings. What is needed is a clear path that solves the problem directly.

POSSIBLE SOLUTIONS

The path to solving the problems highlighted in the previous section should come via an amendment to the Federal Rules of Civil Procedure. It is a fact of business life that most corporate officials who fall into the officer/director/managing agent category travel widely and frequently. Consequently, none of the suggested revisions should place undue hardship on corporations or their personnel.

Require A Corporate Defendant to Produce Its Officials at Trial

The most straightforward amendment would be a blanket rule requiring corporate parties to produce key officials at trial or risk entry of an adverse judgment. Washington State has adopted this approach. Its rule provides that:

A party, or anyone who at the time of the notice is an officer, director, or other managing agent (herein collectively referred to as "managing agent") of a public or private corporation, partnership or association which is a party to an action or proceeding may be examined at the instance of any adverse party. Attendance of such deponent or witness may be compelled solely by notice (in lieu of a subpoena) given in the manner prescribed in Rule 30(a) to opposing counsel of record. Notices for the attendance of a party or of a managing agent at the trial shall be given not less than 10 days before. . . . [F]or good cause . . . the court may make orders for the protection of the party or managing agent to be examined.⁹⁷

⁹⁵ *Id.*

⁹⁶ See *supra* notes 55-95 and accompanying text.

Another alternative may also be available for use in a very limited class of cases. "Director Service Statutes" provide that a director of a corporation implicitly consents to the appointment of the corporation's registered agent as his or her agent for service of process in any action involving the corporation where the director is a necessary or proper party or for violation of a duty owed to the corporation. See, e.g., DEL. CODE ANN. tit. 10, § 3114 (1991).

The Delaware Supreme Court has ruled that a non-Delaware resident whose only contact with the state is the acceptance of a Delaware corporate directorship has sufficient contacts with the state to be subject to its jurisdiction. *Armstrong v. Pomerance*, 432 A.2d 174 (Del. 1980). The statute is limited to a cause of action implicating acts performed in their capacity as directors. See *Hana Ranch, Inc. v. Lent*, 424 A.2d 28 (Del. Ch. 1980).

If the requested executives fail to appear, a judgment against the non-complying party can be entered.⁹⁸

California law is similar: An officer, director, or managing agent of a party or person need not be served with a subpoena as long as written notice requesting the witness to appear is served on counsel for the party.⁹⁹

In *Campbell v. A.H. Robins Co.*,¹⁰⁰ a Dalkon Shield case, the plaintiff sued A.H. Robins, a Virginia corporation, in Washington State court. Under Rule 43(f)(1), the plaintiff served a notice on Robins requesting the presence at trial of 12 Robins' agents who resided outside Washington. The appellate court held that the notice was proper because the plaintiff "did not ask the trial court to compel the attendance of a nonresident witness or to issue a subpoena for service outside Washington. Rather, the notice was addressed to Robins, a party, requesting the appearance of certain of its managing agents at trial."¹⁰¹ The court stressed that the plaintiff had a right to call Robins as an adverse party, but further, that sanctions for noncompliance could run against Robins only.¹⁰² The decision pointed to "the power of the court over the parties to the action, and the

⁹⁸ WASH. CIV. R. 43(f)(3).

⁹⁹ In the case of the production of a party to the record of any civil action or proceeding or of a person for whose immediate benefit an action or proceeding is prosecuted or defended or of anyone who is an officer, director, or managing agent of any such party or person, the service of a subpoena upon any such witness is not required if written notice requesting the witness to attend before a court, or at a trial of an issue therein, with the time and place thereof, is served upon the attorney of that party or person. The notice shall be served at least 10 days before the time required for attendance unless the court prescribes a shorter time. If entitled thereto, the witness, upon demand, shall have paid witness fees and mileage before being required to testify. The giving of the notice shall have the same effect as service of a subpoena on the witness, and the parties shall have such rights and the court may make such orders, including the imposition of sanctions, as in the case of a subpoena for attendance before the court.

CAL. CIV. CODE § 1987(b) (West 1991). In addition, subsection (c) provides:

If the notice specified in subdivision (b) is served at least 20 days before the time required for attendance, or within such shorter time as the court may order, it may include a request that the party or person bring with him or her books, documents or other things. The notice shall state the exact materials or things desired and that the party or person has them in his or her possession or under his or her control. Within five days thereafter, or such other period as the court may allow, the party or person of whom the request is made may serve written objections to the request or any part thereof, with a statement of grounds. Thereafter, upon noticed motion of the requesting party, accompanied by a showing of good cause and of materiality of the items to the issues, the court may order production of items to which objection was made, unless the objecting party or person establishes good cause for nonproduction or production under limitations or conditions.

¹⁰⁰ 32 Wash. App. 98, 645 P.2d 1138 (1982).

¹⁰¹ *Id.* at 1140.

¹⁰² "The rule authorizes the court in its discretion to levy sanctions against the employer, Robins, if its managing agents fail to appear. CR 43(f)(3). The rule avoids the limitations of the subpoena power by addressing its sanctions to the party who has the responsibility to comply with the notice." *Id.* 18

expectation that a party faced with sanctions will exercise its own power over its managing agents."¹⁰³

This direction has the obvious benefit of providing a black letter rule for corporate parties. Parties will know, in advance, that witnesses' testimony can be compelled. A substantial body of law already exists about whether particular individuals are "managing agents."¹⁰⁴ Moreover, the court would have the express authority to issue a protective order in appropriate cases.

This change could be universally accomplished by amending Rule 45(e) to track the Washington rule quoted above¹⁰⁵ (with appropriate modifications). However, a majority of the Federal Courts Committee of the Association of the Bar of the City of New York rejected such an approach.¹⁰⁶ The Committee Report noted that:

[R]egardless of whether the 100-mile rule makes sense in terms of its original rationale, there is no reason to change it unless it is causing problems today, and those problems have not been demonstrated. It does mean that some witnesses appear by deposition rather than in person, but we do not think that this concern justifies abolishing the 100-mile limit. The rule does permit a lawyer in a trial setting who controls a distant witness to force his adversary to rely on deposition testimony, while the lawyer retains the advantage of deciding whether to produce the witness to testify live during the lawyer's own case. This asserted problem is certainly mitigated by the availability of video-taped depositions. Moreover, all procedural rules harbor nooks and crannies of advantage and disadvantage, and we do not think that this one creates a consistent or systematic imbalance that would justify a rule change, particularly in view of the inconvenience and problems caused by case-by-case adjudication of whether individual witnesses can be called to testify.¹⁰⁷

¹⁰³ *Id.* at 1143. Moreover, because the attendance of managing agents of a party may be "compelled" by sanctions against the party itself, who is already subject to the jurisdiction of the court, any potential due process problem is avoided. *Id.*

¹⁰⁴ Who is a "managing agent" in a corporation requires a case-by-case determination. The Eighth Circuit ruled that "an individual is a 'managing agent' if: (1) His interests in the litigation are identified with his principal, and (2) he acts with superior authority and general autonomy, being invested with broad powers to exercise his discretion with regard to the subject matter of the litigation." *Skogen v. Dow Chemical Co.*, 375 F.2d 692, 701 (8th Cir. 1967) (district court's finding that two scientists were not managing agents was erroneous, but harmless error); *see also Krauss v. Erie Ry. Co.*, 16 F.R.D. 126, 127 (S.D.N.Y. 1954) ("A managing agent, as distinguished from one who is merely 'an employee,' is a person invested by the corporation with general powers to exercise his judgment and discretion in dealing with corporate matters; he does not act 'in an inferior capacity' under close supervision or direction of 'superior authority'"). *Id.*

¹⁰⁵ *See supra* notes 11-13 and accompanying text.

¹⁰⁶ Report on Proposed Changes to Rule 45(e)(1) of the Federal Rules of Civil Procedure (Feb. 17, 1989).

Instead, the Committee concluded that there should be no change in the current structure of Rule 45 regarding witnesses controlled by a party. "[T]he disadvantage of being compelled to rely on deposition testimony at trial, particularly given the availability of video-taped depositions, does not justify the increased inconvenience to witnesses, and increased expense and complexity of litigation, that would be entailed by authorizing nationwide service on a case by case basis.¹⁰⁸

It seems that the Committee did not adequately consider that videotaped depositions are more expensive and may be more time consuming for the court in having to rule on objections. At least one court has found videotaped testimony wanting where the testimony was of a key witness and credibility was at issue.¹⁰⁹ A systematic, easy to apply, general rule seems far preferable.¹¹⁰

Revised Rule 30(b)(6)

A second approach would be to broaden Rule 45 to incorporate a provision modeled on Rule 30(b)(6), which applies to depositions.¹¹¹ That rule now provides that a party may serve a deposition notice on a corporation (the rule also applies to partnerships, associations, and other entities) describing the matters on which examination is requested. The noticed entity must then designate knowledgeable officers, directors, managing agents, or other persons to give testimony on the requested subjects.¹¹² Under Rule 30(b)(6), a party "must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought . . . and to prepare those persons in order that they can answer

¹⁰⁸ *Id.* at 11-12.

¹⁰⁹ *Paul v. Int'l Precious Metals Corp.*, 613 F. Supp. 174 (S.D. Miss. 1985), involved tort, fiduciary duty, and federal commodities law claims concerning contracts for the purchase of precious metals. The plaintiff resided and brought suit in Mississippi. The defendant corporation was located in Florida and it successfully moved to transfer the case to that state's Southern District under 28 U.S.C. § 1404(a). The court wrote that:

[T]he key witness in the Plaintiff's fraud action against the Defendant is . . . no longer . . . employed by the Defendant and is not subject to subpoena should this action be tried in the Southern District of Mississippi. In view of the importance of this testimony and the credibility determinations to be made based upon it, the Plaintiff's suggestion that his testimony be presented through videotaped deposition is particularly unappealing.

Id. at 179. See also *supra* note 58.

¹¹⁰ The Committee Report noted (at 1, n.1) that the Federal Court Committee of the New York State Bar Association took a contrary position and endorsed a rule authorizing district courts to compel testimony by party-employee witnesses.

¹¹¹ In *Cipollone v. Liggett Group, Inc.*, No. 83-2864(SA), the plaintiff argued that it could compel the attendance at trial of a deposition witness designated by Liggett under Rule 30(b)(6). The district court disagreed. "Nothing in Rule 30(b)(6) permits plaintiff to compel the appearance at trial of a witness outside of the Court's subpoena power granted by [Rule] 45(e)(i). . . . The rule neither states nor implies that such designation also amounts to a waiver of any objection to that witness' appearance at trial." Transcript, at 73 (Feb. 2, 1988).

fully, completely, unequivocally, the questions posed . . . as to the relevant subject matters."¹¹³

Rule 45 could be amended to apply Rule 30(b)(6) deposition procedures to trials. A party could then serve a notice requiring a corporate opponent to designate as trial witnesses persons knowledgeable about specifically described subjects. The effect of the Rule change would be to allow a party to obtain testimony from knowledgeable persons employed by the adverse corporation, but not subject as individuals to the subpoena power of the forum court, and obtain sanctions against that adverse party -- not the individuals -- for noncompliance with the request. An additional benefit is that the testimony of the persons designated pursuant to Rule 30(b)(6) "is the testimony of the corporation and, if the corporation is a party, the testimony may be used at trial by an adverse party for any purpose."¹¹⁴

In fact, a variant of this proposal has already been used. In *In re Washington Public Power Supply System Litigation*,¹¹⁵ the court required testimony of witnesses beyond the subpoena power of the District Court to be transmitted to the courtroom live by satellite. The testimony would be compelled by the deposition rules.¹¹⁶

Nonetheless, this solution has flaws. A requesting party will have to carefully craft its notice to obtain the witnesses it wants. But that may not be an insurmountable difficulty at trial, particularly if discovery has narrowed down the

¹¹³ *Mitsui & Co. (U.S.A.), Inc. v. P.R. Water Resources Auth.*, 93 F.R.D. 62, 67 (D.P.R. 1981).

¹¹⁴ *GTE Products Corp. v. Gee*, 115 F.R.D. 67, 68 (D. Mass. 1987). See also *Lapenna v. Upjohn Co.*, 110 F.R.D. 15, 20 (E.D. Pa. 1986) ("When a corporation produces an employee pursuant to a Fed. R. Civ. P. 30(b)(6) notice, it represents that the employee has the authority to speak on behalf of the corporation with respect to the areas within the notice of deposition. This extends not only to facts but also to subjective beliefs and opinions."). *Id.*

¹¹⁵ M.D.L. No. 551, unpublished order (D. Ariz. Aug. 9, 1988).

¹¹⁶ *Id.* See generally Note, *Clever Tool or Dirty Pool?: WPPSS, Closed Circuit Testimony and the Rule 45(e) Subpoena Power*, 21 ARIZ. ST. L.J. 275 (1989).

Live testimony by satellite was also permitted in *In re San Juan DuPont Plaza Hotel Fire Litigation*, 129 F.R.D. 424 (D.P.R. 1989). Judge Acosta rationalized that:

The Court has little doubt that the presentation of live testimony by satellite is a viable, and even refreshing, alternative to the deadening recitation of numerous depositions. It also would be most helpful to the jury in the fulfillment of their sworn duties. After all, the purpose of trial is precisely to ensure the truth-seeking process which, to a great extent, is based on the demeanor of witnesses. In addition, the use of satellite transmitted testimony avoids the burdens and problems inherent in the arranging of travel schedules, conflicting obligations, and extended stays in the transferee district because of the uncertainties of trial schedules.

possible witnesses.¹¹⁷ However, the examination would be confined to matters stated "with reasonable particularity" in the deposition notice.¹¹⁸ As a result, counsel would have to pay serious attention to that deposition notice, to ensure that she gets the right witness before the court at trial, and able to obtain testimony in the desired areas.

Provide the Trial Court With Discretion to Require Attendance at Trial

The third approach would be to give trial courts discretion to require corporate parties to make their officers, directors and managing agents (who as individuals are outside the subpoena power) available for examination at trial upon a showing of need. The showing could include a demonstration why presenting deposition testimony would be an inadequate alternative and the importance of the witness's testimony. On the other side of the balance could be the burden to the corporate party and the witness.

This amendment would require corporations to produce personnel located outside the court's venue at trial, but would protect them from undue burden and expense. However, additional effort would be required by the adverse party and the court.¹¹⁹

CONCLUSION

A common sense approach is needed to solve the very real problems at trial created under the current Federal Rules. The Supreme Court should recognize that, with much of the high stakes¹²⁰ federal court litigation involving multi-state and multi-national enterprises, artificial limitations on the ability to compel trial testimony of persons controlled by corporate parties is irrational. Business is often done on a national and world-wide basis, and executives think nothing of long distance air travel.¹²¹ Moreover, nation-wide subpoena power is

¹¹⁷ Indeed, "[t]he problem of identifying an opponent corporation's spokesman on a particular point has been greatly diminished with the adoption of Fed. R. Civ. P. 30(b)(6), which in effect places the onus for identification on the corporation." *Lapenna*, 110 F.R.D. at 20.

¹¹⁸ *Paparelli v. Prudential Ins. Co. of Am.*, 108 F.R.D. 727, 730 (D. Mass. 1985).

¹¹⁹ This proposal could be implemented by adding to the Federal Rules of Civil Procedure a new section to Rule 45:

If the subpoena is for the attendance of a director, officer, or managing agent of a corporation and such person does not reside within the district or within 100 miles of the place of the hearing or trial, then the party filing the notice must show good cause why such person should appear at the hearing or trial. For good cause shown, the district court may, in its discretion, require the corporation to produce such person at the trial or hearing.

¹²⁰ For example, under the 1988 amendments to Title 28, diversity jurisdiction exists only where the matter in controversy exceeds \$50,000. 28 U.S.C. § 1332(a) (1988). It is also more difficult to remove a case based on diversity jurisdiction. *Id.* § 1446.

¹²¹ See Bucklo, *supra* note 4, at 54 ("The breadth of the courts' subpoena powers has not caught up with modern air travel."

available in federal criminal cases.¹²² The Court should amend the Rules to remedy this situation in civil cases.

¹²² FED. R. CRIM. P. 17(e)(1) ("A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States.").

