LAWYERS FOR CIVIL JUSTICE

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11-CV-009

January 5, 2012

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: LCJ Supports Proposed Amendments to Federal Rule of Civil Procedure 45

Dear Secretary McCabe:

Lawyers for Civil Justice has reviewed the May 2011 Report of the Civil Rules Advisory Committee and its revisions to Rule 45 of the Federal Rules of Civil Procedure. This letter is submitted in support of the proposed amendments to Rule 45.

The proposed revisions best reflect our previous conclusion that Rule 45 should *not* compel nationwide trial appearance pursuant to subpoena service for parties and party officers. Attached are two previous Comments submitted by LCJ that set forth the reasons for the positions summarized in this letter.

The traditional justifications for the 100 mile rule have been protecting witnesses from harassment and minimizing litigation costs. These justifications remain viable today, especially in the world of multistate litigation. Moreover, modern technology, such as videotaped depositions, can provide parties with the necessary tools for truth seeking they desire while balancing the interests of a distant witness. Therefore, LCJ endorses the proposed amendments, because they do *not* mandate nationwide trial appearance pursuant to subpoena service on parties or party officers. Accordingly we are opposed to the alternatives set forth in appendix to the committee's report at 29.
http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publication%20Aug%202011/CV_Report.pdf

Furthermore, LCJ agrees with the addition of revised Rule 45(a)(4), which highlights the notice requirement of subpoenas commanding the production of documents or the inspection of premises. Such notice will achieve the Committee's goal of providing other parties with the opportunity to object to a subpoena or to request additional materials. No further notices should be required beyond the one specified in Rule 45(a)(4).

Finally, LCJ supports the "exceptional circumstances" standard required under revised Rule 45(f) to transfer a subpoena-related motion to the issuing court, absent the consent of the parties and the person responding to the subpoena. LCJ agrees that in certain extraordinary situations, Rule 45 should allow a subpoena dispute to be transferred to the issuing court—*e.g.*, when the decision to enforce the subpoena would go to the merits of the case or would be case dispositive—but such transfers should be rare. Accordingly, LCJ believes that the "exceptional circumstances" standard to transfer motions to the issuing court should *not* be broadened. If a party can use a Rule 45 subpoena to harass a witness who resides outside of the state and beyond the issuing court's 100-mile radius by requiring him or her to hire counsel to contest a subpoena in a distant issuing court, some of the fundamental purposes of the 100-mile rule's protections have been defeated. Therefore, LCJ recommends that revised Rule 45(f) be adopted with the "exceptional circumstances" standard.

In conclusion, Lawyers for Civil Justice commend the Committee's proposed amendments to Rule 45 for clarifying the language of Rule 45 and for **not** providing for nationwide trial appearance pursuant to subpoena service on parties or party officers.

We thank you for the opportunity to submit these comments.

Sincerely,

L. Gino Marchetti, Jr.	John H. Martin
President, Lawyers for Civil Justice	Board Chair and Immediate Past President

cc: Barry Bauman, Executive Director, Lawyers for Civil Justice

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March 30, 2011

Honorable David G. Campbell
Chairman, Rule 45 Subcommittee
Advisory Committee on Civil Rules
Sandra Day O'Connor U.S. Courthouse
401 Washington Street
Phoenix, Arizona 85003

Re: Federal Rule of Civil Procedure 45

Dear Judge Campbell:

Lawyers for Civil Justice submits the following on the Subcommittee's amendment package and its four proposed revisions of Rule 45 of the Federal Rules of Civil Procedure. We support the Comprehensive Amendment Proposal—Alternative A ("Comprehensive Alternative A").

Comprehensive Alternative A best reflects our previous conclusion that Rule 45 should *not* compel nationwide trial appearance pursuant to subpoena service for parties and party officers. The traditional justifications for the 100 mile rule have been protecting witnesses from harassment and minimizing litigation costs. These justifications remain viable today, especially in the world of multistate litigation. Moreover, modern technology, such as videotaped depositions, can provide parties with the necessary tools for the truth seeking they desire while balancing the interests of a distant witness. Therefore, LCJ supports the revisions proposed by Comprehensive Alternative A, because it does *not* mandate nationwide trial appearance pursuant to subpoena service on parties or party officers.

One section, however, of Comprehensive Alternative A's proposed Rule 45 proves to be a source of continuing concern for LCJ. Specifically, we are concerned that the new section 45(f)—entitled "Transfer of Subpoena-related Motions"—gives the court where a subpoena-related motion is made too much discretion. LCJ agrees that in certain extraordinary situations, Rule 45 should allow a subpoena dispute to be transferred to the issuing court—*e.g.*, when the decision to enforce the subpoena would go to the merits of the case or would be case dispositive—but such transfers should be rare. If a party can use a Rule 45 subpoena to harass a witness who resides outside of the state and beyond the issuing court's 100-mile radius by requiring him or her to hire counsel to contest a subpoena in a distant issuing court, some of the fundamental purposes of the 100-mile rule's protections will have been defeated. We favor the approach suggested by the Feb. 23, 2011 letter from the ABA Section of Litigation that proposes a more demanding "exceptional circumstances" standard.

See, Discovery Subcommittee Rule 45 Issues Memorandum at 21-22. Therefore, LCJ requests that the Advisory Committee keep these considerations in mind when revising Rule 45.

In conclusion, Lawyers for Civil Justice commend the subcommittee's Comprehensive Amendment Proposal—Alternative A for clarifying the language of Rule 45 to **not** provide for nationwide trial appearance pursuant to subpoena service on parties or party officers. We are also pleased that the proposal makes Rule 45 much more clear and eliminates the so-called "three ring circus" aspects of the Rule.

We thank you for the opportunity to submit these comments.

Sincerely,

John H. Martin
President, Lawyers for Civil Justice

cc: Judge Mark R. Kravitz
Judge Lee H. Rosenthal
Professor Edward H. Cooper
Professor Richard L. Marcus
Andrea L. Kuperman
All Members on Advisory Committee on Civil Rules

LAWYERS FOR CIVIL JUSTICE

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November 5, 2010

Honorable David G. Campbell
Chairman, Rule 45 Subcommittee
Advisory Committee on Civil Rules
Sandra Day O'Connor U.S. Courthouse
401 Washington Street
Phoenix, Arizona 85003

Re: Federal Rule of Civil Procedure 45

Dear Judge Campbell:

Lawyers for Civil Justice have reviewed your subcommittee's memorandum and have discussed the possible revision of Rule 45 of the Federal Rules of Civil Procedure. This letter provides our comments on the proposed revisions.

After reviewing the history of Rule 45 and the courts' conflicting interpretations, Lawyers for Civil Justice ("LCJ") have concluded:

1. Rule 45 should be clarified to reflect Judge Vance's ruling in *Big Lots* that the 1991 amendments to Rule 45 did *not* create nationwide trial appearance pursuant to subpoena service for parties and party officers;

2. The issuing court should generally have the authority to decide subpoena disputes under Rule 45. Rule 45 should also grant the issuing court discretion to transfer the dispute to the forum court, but only if the decision would impact the merits of the case;

3. Rule 45 should be amended to emphasize the notice required for third-party subpoenas;

4. Rule 45 should be modified to allow a person thirty (30) days to object to a subpoena or the objection is waived; and

5. Other than the aforementioned clarifications, Rule 45 should be left alone with no further streamlining or reformatting.

1. Rule 45 Does Not and Should Not Allow Nationwide Subpoena Service on Parties and Party Officers.

In regards to whether Rule 45 allows nationwide trial appearance pursuant to subpoena service on parties and party officers, LCJ has made three conclusions: (1) current Rule 45 as written does not allow a court to compel nationwide trial appearance; (2) from a policy standpoint nationwide trial appearance pursuant to subpoena should not be allowed; and, therefore, (3) Rule 45 should be amended to clarify that a court cannot compel nationwide trial appearance pursuant to a subpoena.

Rule 45 as currently written does not allow for nationwide trial appearance pursuant to subpoena service on parties or party officers. In *Johnson v. Big Lots Stores, Inc.*, 252 F.R.D. 213 (E.D. La. 2008), Judge Vance correctly held that Rule 45(b)(2) defines the only set of circumstances under which a subpoena can be properly served in the United States, and this does not include nationwide trial appearance pursuant to subpoena. LCJ supports the reasoning of Judge Vance in *Big Lots* and the courts that have followed her decision.

Now the Subcommittee has to decide whether or not to amend Rule 45 to allow nationwide trial appearance pursuant to subpoena, and LCJ has concluded that Rule 45 should not be so amended. Judge Fallon in *In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664 (E.D. La. 2006), presented a number of policy reasons for why he thought nationwide trial appearance of parties and party officers should be allowed in today's modern world, and we address each of those policy arguments in turn.

First, the court in *Vioxx* found that the traditional justifications for the 100 mile rule are now "questionable, if not anachronistic," but LCJ disagrees. *See id.* at 668. Historically, the 100 mile rule has been justified as protecting "witnesses from the harassment of long, tiresome trips," and minimizing litigation costs. *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 234 (1964). In *Vioxx*, however, the court argued that in today's world of multistate litigation, the opposite would be true. 438 F. Supp. 2d at 668. The court found that travel across the United States now costs less and takes less time than it did in the 1960s, and it would cost less money for one person to travel to appear in trial than it would cost to have a team of lawyers travel to take his deposition. *Id.* Based upon their own experiences, however, LCJ members respectfully disagree with the court. Whether or not a flight costs less and takes less time does not diminish the fact that requiring a person to travel across country for a trial can still be used as a form of harassment. Senior officers could be tied up perpetually if they were required to provide live testimony in every trial, especially when there are multijurisdictional suits involved. In addition, the costs of making a corporate officer attend the trial will usually be *in addition to* the costs of taking his or her deposition. So few cases actually make it to trial that most important witnesses are deposed during the discovery phase for purposes of receiving enough information to come to an informed settlement agreement. Therefore, the 100 mile rule should remain intact, even in today's modern world, based upon the traditional justifications of protecting witnesses from harassment and minimizing litigation costs.

The court in *Vioxx* also found that the 100 mile rule "actually inhibits the truth seeking purpose of litigation." *Id.* We respectfully disagree. Even without nationwide subpoena service for trial, a party can still get a deposition subpoena. Therefore, a party is not losing critical evidence. Rule 32(a)(3)–(4) of the Federal Rules of Civil Procedure even anticipates the issue of a corporate director or officer being outside the 100 mile "bulge." Rule 32(a) allows an adverse party to use the deposition of a party, or a party's officer or director, in court proceedings when "the witness is more than 100 miles from the place of hearing or trial." In addition, when a corporate officer or director has vital information that would be helpful to a jury, most LCJ members have found that the parties agree ahead of time to produce that witness at trial. Therefore, the 100 mile rule cannot be said to inhibit any truth seeking.

Finally, the court in *Vioxx* argued that the 100 mile rule leaves juries with the deposition, a "second best" to live testimony. *Id.* While LCJ agrees that reading a deposition transcript would not be as compelling as seeing a witness testify live, the members of LCJ have found that most depositions taken today are videotaped. A videotaped deposition provides the jury with the witness's demeanor, which makes it similar to live testimony. In addition, from the moment a petition is filed, parties can determine which witnesses fall outside the court's trial subpoena authority and can be sure to videotape those depositions for use at a future trial. Thus, with the availability of modern technology, a jury can still have the tools it needs to gage a witness's credibility and character through videotape without the parties having to incur the extra expense and time of requiring a party officer to travel to the courthouse when the officer is outside its jurisdictional authority.

In conclusion, LCJ requests that Rule 45 be amended to clarify that nationwide trial appearance pursuant to subpoena service is *not* allowed.

2. Issuing Court Should Have Discretion to Transfer Dispute Over Subpoena to Forum Court.

In general, LCJ agrees with the Rule 45 Subcommittee that Rule 45 should allow the issuing court to transfer the subpoena dispute to the forum court, but only in extraordinary situations. These extraordinary situations should include when the decision to enforce the subpoena would go to the merits of the case or would be case dispositive.

We are, however, concerned about giving the issuing court too much discretion, to the point that the issuing court automatically transfers the dispute to the forum court. In addition, LCJ does not believe the forum court should be the issuing court. In either of these two situations, a plaintiff could use a Rule 45 subpoena to harass a corporate officer or employee who lives outside of the state and beyond the forum court's 100-mile radius by requiring him or her to travel to the forum court to dispute the subpoena. LCJ requests that the Advisory Committee on Civil Rules keep these considerations in mind when revising Rule 45.

3. Rule 45 Should be Amended to Emphasize the Notice Requirement for Third-Party Subpoenas.

LCJ agrees with the Subcommittee that Rule 45 should be amended to emphasize the notice requirement for parties serving a third-party subpoena.

4. Rule 45 Should be Amended to Allow Thirty Days to Object to Subpoenas.

LCJ requests that Rule 45 be modified to allow thirty (30) days to object to a subpoena. As currently written, Rule 45 could lead a party to accidentally waive its objections by relying only on the thirty-day return date. We believe the deadline to object and the return date should be the same to avoid confusion.

5. No Further Modifications Should be Made to Rule 45.

Other than the small modifications requested above, Lawyers for Civil Justice would prefer that the Advisory Committee on Civil Rules refrain from streamlining, shortening, or otherwise changing the text of Rule 45. While Rule 45 is lengthy in its current form, many members of LCJ find Rule 45 more understandable than other procedural rules, because it is complete in itself. Its minimal amount of cross-referencing allows attorneys to read the current Rule 45 and interpret it without having to refer to other rules. In addition, LCJ is concerned that a complete re-writing of Rule 45 could lead to further unforeseen confusion in the future. At this time, LCJ members do not have any difficulty in interpreting Rule 45 and would prefer that it generally remain intact.

In conclusion, Lawyers for Civil Justice request that the Advisory Committee on Civil Rules make the above clarifications to Rule 45 without completely overhauling its current form. LCJ would like to emphasize that the most important of the above clarifications to Rule 45 is the need for clear language stating that Rule 45 does **not** provide for nationwide trial appearance pursuant to subpoena service on parties or party officers.

We thank you for the opportunity to submit these comments.

Sincerely,

John H. Martin
President, Lawyers for Civil Justice

cc: Judge Mark R. Kravitz
Judge Lee H. Rosenthal
Professor Edward H. Cooper
Professor Richard L. Marcus
John K. Rabiej
All Members of Advisory Committee on Civil Rules