February 1, 2012

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

Re: Proposed Amendments to Rule 45 of the Federal Rules of Civil Procedure

Dear Mr. McCabe:

The American College of Trial Lawyers is dedicated to maintaining and improving the standards of trial practice, the administration of justice and the ethics of the legal profession. The Federal Civil Procedure Committee of the College (the "Committee") is charged with monitoring the operation of the Federal Rules of Civil Procedure and, when requested, evaluating proposed changes.

The Committee has reviewed the proposed amendments to Rule 45 of the Federal Rules of Civil Procedure in order to address the issues on which the Judicial Conference Advisory Committee has sought comment. Our comments on each of these issues are set forth below. In addition, we have addressed one additional issue relating to a potential unintended consequence of the proposed amendments.

1. Whether Additional Notices Should Be Required Following the Issuance of Subpoenas

The proposed amendment to Rule 45 would move the notice requirement for subpoenas from its current obscure location and give it its own subsection, to be designated as Rule 45(a)(4). The amendment would also modify the language. As proposed by the Advisory Committee, new Rule 45(a)(4) would provide:

> ***Notice to Other Parties.*** If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises, a notice and copy of the subpoena must be served on each party before the subpoena is served on the person to whom it is directed.

Before the Advisory Committee issued the proposed amendment, it considered whether the amendment should also explicitly require the party

NATIONAL OFFICE
19900 MacArthur Blvd.
Suite 530
Irvine, CA 92612
t: 949.752.1801
f: 949.752.1674
www.actl.com

serving the subpoena to give other parties any additional notice regarding the subpoenaed party's compliance with the subpoena and the opportunity to obtain access to the materials produced in response to the subpoena. By letter dated February 23, 2011, a number of members of the Council and Federal Practice Task Force of the Section of Litigation of the American Bar Association urged that proposed Rule 45(a)(4) read as follows:

> ***Notice to Other Parties.*** If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then the subpoena issuer,
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> (A) before the subpoena is served, must serve a notice including a copy of the subpoena on the other party;
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> (B) must give the other party reasonable notice of any written modification of the subpoena or any new date and time of inspection or production; and
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> (C) must make available the documents, electronically stored information, or tangible things produced for inspection and copying by the other party in a timely fashion.

The Advisory Committee rejected this proposal and declined to include any further notice requirements in the rule itself. The Advisory Committee Note to proposed Rule 45(a) states:

> Parties desiring access to information produced in response to the subpoena will need to follow up with the party serving it or the person served to obtain such access. The party serving the subpoena should make reasonable provision for prompt access.

The Request for Comments notes that "Comments are especially sought on whether additional notices should be required concerning production of subpoenaed materials," as well as on other issues.

The Committee believes that the additional notices suggested by the Litigation Section should be required. At the very least, we believe that proposed Rule 45(a)(4) should include the provision in the Advisory Committee Note, by stating, "The party serving the subpoena must make reasonable provision for prompt access by all parties to all materials produced by the person to whom the subpoena is directed."

From our perspective as practicing trial lawyers, we believe that the better practice is to place the burden on the party issuing a subpoena to provide

notice to the other parties of production of documents pursuant to the subpoena. Our support for this additional notice provision is based on the strong views of the prominent members of Litigation Section members; anecdotal evidence of incidents in which parties have struggled to obtain copies of materials produced by non-parties from the party who subpoenaed the materials; and the fact that the Advisory Committee itself saw fit, in its Note to proposed Rule 45(a)(4), to remind practitioners that they must give other parties "reasonable provision for prompt access" to materials subpoenaed from third parties.

In addition, the Committee conducted an overview of state court rules of civil procedure on this issue. We identified thirty-five states that have provisions for the service of document subpoenas on non-parties somewhat analogous to Rule 45. Seventeen of those states have engrafted additional requirements along one or more of the lines suggested by the ABA Litigation Section as described above; eighteen do not require any notice beyond that now in Rule 45(b)(1), *i.e.*, advance notice of the intent to serve the subpoena. The Committee believes that the additional requirement in Rule 45 may lead to greater uniformity at the state level as well.

2. Whether Consent of All Parties Should Be Required to Transfer a Subpoena Related Proceeding

Proposed Rule 45(f) adds authority for the court in which a subpoena-related motion is filed (such as a motion to quash) to transfer the matter to the court in which the underlying case is pending. However, the Rule would permit transfer only when all parties consent or where the court finds that "exceptional circumstances" support transfer. The Advisory Committee sought comment on whether consent of all parties should be required and whether the "exceptional circumstances" standard was "too confining." The Committee believes that only consent of the non-party receiving the subpoena should be required and, absent such consent, the "exceptional circumstances" language should remain in proposed Rule 45(f).

In our view, the non-party who is subpoenaed is the one who is most affected by enforcement of the subpoena. Therefore, if that non-party consents to the transfer of any motion regarding enforcement of the subpoena to the court in which the action is pending, the court in the compliance district should have broad discretion for such a transfer. As a practical matter, it is unlikely that a party to the action will oppose a transfer if the non-party consents to the transfer. The Committee also

agreed that the compliance court should retain discretion as to whether to grant or deny the transfer.[1]

The Committee recommends that the "exceptional circumstances" language remain in proposed Fed. R. Civ. P. 45(f). In our view, if the non-party who has received the subpoena objects to a transfer, its interests should be considered paramount.

3. Whether Rule 45 Should Be Expanded to Allow for Limited National Subpoena Power over Parties and Their Officers

The Committee does not support expanding Rule 45 to allow for national subpoena power over parties or their officers to require their attendance at trial. In examining this issue, however, we determined that there was a wide difference of opinion and substantial support for the alternative proposal presented by the Advisory Committee in the Appendix to its report.

Prior to being amended in 1991, Rule 45 limited the issuance of subpoenas by providing 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." In 1991, the Rule was amended in two respects that are pertinent to the present amendments to Rule 45. First, Rule 45(b) was split into two subparts and the extent of a court's subpoena power was moved to Rule 45(b)(2), which now provided that "[*s*]*ubject 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, 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." (Emphasis added). Second, the Rule added a new Subsection (c), entitled "Protection of Persons Subject to Subpoena" which, according to the Advisory Committee comments to the 1991 amendments was designed to "clarify and enlarge the protections afforded persons who are required to assist the court by giving information or evidence." Of note here, Rule 45(c)(3)(A)(ii) provides that a court issuing a subpoena "shall quash or modify" it if it "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." (Emphasis added). The issue raised by the current

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[1] The Committee also recommends that the words "the parties and" should be deleted in the fourth line of proposed Fed. R. Civ. P. 45(f). That will necessitate a corresponding change by adding "s" to "consent" in the fifth line of proposed Fed. R. Civ. P. 45(f).

proposed amendment to Rule 45 arose out of judicial interpretations of whether the "subject to" clause in Rule 45(b)(2) expanded the scope of subpoena power over parties and their officers.[2]

The current amendments are designed to clarify this issue by returning to the pre-1991 language and meaning of the Rule. Proposed Rule 45(c)(1) provides that "a subpoena may command a person to attend a trial, hearing or deposition *only* as follows:"

> **(A)** within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
>
> **(B)** within the state where the person resides, is employed, or regularly transacts business in person, if
>
> > **(i)** the person is a party or a party's officer; or
> >
> > (ii) the person is commanded to attend a trial and would not incur substantial expense.

By using the word "only" before defining the scope of the subpoena power, the proposed rule is quite clear: whether a party or non-party, the scope of subpoena power is limited to the district and the 100 mile rule. Any doubt on this issue is resolved by proposed Rule 45(d)(3)(A)(ii) (the revised version of the current rule Rule 45(c)(3)(A)(ii) which requires the court to quash a subpoena if it "requires a person to comply beyond the geographical limits specified in Rule 45(c)."

The Committee endorses this proposed change and the Advisory Committee's reasons for the change. The Advisory Committee noted that

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[2] As the Advisory Committee Report points out, in *In Re Vioxx*, 438 F.Supp. 2d 664 (E.D.La.2006), the court concluded that the language of Rule 45(c)(3)(A)(ii) did expand that power, apparently by restricting the court's power to quash trial subpoenas to parties and their officers, whereas in *Johnson v. Big Lot Stores*, 251 F.R.D. 213 (E.D.La. 2008) a different judge on that Court reached exactly the opposite conclusion, finding that although a "majority of courts" (as cited in *Vioxx*) had concluded that the clause in Rule 45(b) expanded the court's power, that limiting clause could not, by "inverse inference" expand the Rule's scope as applied to parties and their officers. Instead, the *Johnson* court concluded that Rule 45(b)'s reference to Rule 45(c)(3)(A)(ii) was simply designed to reference the limitations on the subpoena power. Even the *Vioxx* court recognized that nothing in the Advisory Committee comments to the "history or adoption of ...Rule 45(b)(2)...conveys any intention to alter the 100 mile rule." 438 F.Supp. 2d at 667. But the court concluded, in effect, that the additional language relating to parties and their officers must have meant something, and that the plain language of the Rule must be interpreted to mean that parties and their officers could be subpoenaed for trial even if outside the district and beyond the 100 mile limitation.

"opposition to extending the authority to compel a party's appearance at trial commonly rests on the fact that trial subpoenas may impose severe burdens on high level officials within many organizations" and could be misused to gain "strategic advantage," including in settlement negotiations. The Advisory Committee also expressed the view that live testimony was often overrated and that video depositions or trial testimony "through a flat screen" could be just as effective.

The Committee also recognizes, however, that there are strong arguments on the other side of this issue. Recognizing some differences of opinion as to whether a court should have the power to compel a party to appear at trial, the Advisory Committee drafted, but did not recommend, a proposed alternative rule 45(c)(3) that would provide that "for good cause the court may order a party to appear and testify at trial, or to produce an officer to appear and testify at trial" after considering "the alternative of an audiovisual deposition under Rule 30 or testimony by contemporaneous transmission under Rule 43(a)." Under this alternative, the court could also order that the party or officer be reasonably compensated for expenses incurred in attending the trial, and could impose the sanctions authorized by Rule 37(b) on the party subject to the order if the order is not obeyed.[3] Under this alternative version, the Advisory Committee also noted that "the court should be alert to the possibility that a party may be attempting to apply settlement or other pressure by seeking to impose on the other party the time and cost burdens of traveling to testify at trial."

While the Committee recognizes that it is impossible to anticipate all of the circumstances that might occur before trial and that providing federal courts with limited discretion to require a party or officer of a party to appear at trial has strong support, on balance the Committee prefers the proposal recommended by the Advisory Committee.

4. Potentially Unintended Consequence of Adopting Proposed Amended Rule 45(c)(1)

The Committee would like to take this opportunity to address a matter for which input has not been sought. We are concerned that the proposed amendment to Rule 45(c)(1) might have the unintended consequence of overturning settled law on the location of *party* depositions. More specifically, we are concerned that courts, contrary to settled practice, might apply amended Rule 45(c)(1), rather than Rule 30, in deciding the

[3] Note that the Advisory Committee points out that there is "no parallel authority conferred by Rule 45(c)(3) to order testimony by party witnesses at a 'hearing' that is not the trial on the merits."

location of a party's deposition. Application of the clear language of amended Rule 45(c)(1) would, in turn, deprive defendants of the right they possess under current law to choose (in most instances at least) the place where a plaintiff may be deposed.

Current Practice

Today, courts uniformly apply Rule 30, rather than Rule 45, in deciding the location of a party's deposition. For example, courts typically require a plaintiff to travel to the district in which she filed suit to be deposed. *See, e.g., Karakozova v. University of Pennsylvania*, 2010 U.S. Dist. Lexis 102731 at *4-*5 (E.D. Pa. 2010) (applying Rule 30, court held that plaintiff noticed for deposition in forum that she chose must appear there in absence of unreasonable hardship or exceptional circumstances). The notion that one party must subpoena another for her deposition is something that most trial lawyers would dismiss with a wave of the hand.

Although Rule 30 does not expressly say so, it does contain provisions that support the proposition that it – and not Rule 45 - is the rule that governs the location of party depositions. Rule 30(g) imposes sanctions for a noticing party's failure either (1) to proceed with a deposition that it has *noticed* or (2) to *subpoena a non-party deponent*. The unmistakable implication is that, while a party's deposition may simply be noticed, a non-party must be subpoenaed under Rule 45. And, Rule 30(b)(6) provides that "[a] *subpoena* must advise a *non-party* organization of its duty to make the designation." A party organization thus need not be subpoenaed for a 30(b)(6) deposition – a proposition about which the 1971 comment to Rule 30(b)(6) leaves no doubt. ("Under the rules, a *subpoena rather than a notice of examination* is served on a non-party to compel attendance at the taking of a deposition.")

The proposition that Rule 30, rather than Rule 45, governs the location of party depositions also finds support in Rule 37. Rule 37(d)(1)(A)(i) imposes sanctions on a party who fails to appear at a deposition after having been served with "proper notice." Here again, the accepted premise is that a party need not be served with a subpoena to appear at a deposition.

Proposed Rule 45(c)(1) May Limit the Location of a Party's Deposition

Proposed amended Rule 45(c)(1), as currently drafted, appears to contradict the currently recognized – and, as we have pointed out, well settled – proposition that the location of, and the obligation to appear at, a party deposition are governed by Rule 30. The proposed rule provides:

(c) **Place of Compliance.**

(1) **For a Trial, Hearing, or Deposition**. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if

(i) the person is a *party or party's officer*, or

(ii) the person is commanded to attend a *trial* and would not incur substantial expense.

Proposed Amended Rule 45(c)(1) (emphasis added).

Without question, this proposed rule provides for service of deposition subpoenas on both parties and non-parties. As paragraph (B)(1) makes clear, a "person" can be "a party or party's officer." The proposed rule thus would appear to govern – or, at a minimum, could easily be read to govern - the place where a party's, as well as a non-party's, deposition may take place. For example, in a case in which the plaintiff resides and works in a foreign state and in a place that is more than 100 miles from the forum, a court construing proposed Rule 45(c)(1) in accordance with its clear language might well accept the plaintiff's argument that Rule 45 governs the location of her deposition and that she can be deposed only in the state where she can be subpoenaed – *i.e.*, the state in which she lives and works. It is our view that this is an undesirable result. It is much better that courts have the discretion that they now possess under Rule 30 to decide where a party's deposition should take place.

Our Comments Focus Solely on Subpoena of Party for Deposition, not for Trial

Note that we have confined our comments on the impact of Rule 45(c)(1) to its implications for the location of a party's *deposition*. We regard a *trial* as being altogether different. Subpoenas are often used to guarantee a party's presence at trial, provided that the subpoena complies with Rule

45. We do not believe that this practice should be abolished. Again, the sole objective of our critique is to prevent rulings that, based on the language of proposed Rule 45(c)(1), would, for determinations of where a party's *deposition* may take place, replace the broad discretion that courts currently have under Rule 30 with the very narrow limits that are provided for in proposed Rule 45(c)(1).

Current Rule 45

The foregoing analysis might lead one to believe that current Rule 45 is expressly inapplicable to the deposition of a party. Alas, it is not that simple. One has to look hard to find it, but current Rule 45 – see subparagraphs (b)(2) and (c)(3) – does seem to contemplate service of a deposition subpoena on a party. Yet, as we have discussed, courts and lawyers alike invariably proceed on the assumption that Rule 30 is the sole rule governing the location of, and the obligation to attend, a party deposition. It is our belief that lawyers and judges either do not realize that Rule 45 could conceivably apply to this determination or have chosen to ignore this possibility. This undoubtedly is attributable to the fact that settled case law holds that Rule 30 governs party depositions and to the fact that, as noted at the outset of this discussion, the case law finds support in provisions of both Rule 30 and Rule 37. But, the fact that lawyers and judges never consider Rule 45 as being applicable to party depositions may also be attributable, at least in part, to the confusing language of subparagraphs (b)(2) and (c)(3) of current Rule 45 and the impenetrable structure of current Rule 45 as a whole. And, here precisely is where the proposed amended rule's greatest strength becomes a drawback.

Simplicity of the Proposed Amended Rule Will Now Be a Drawback

The proposed amended rule's great attribute is its simplicity. The drafters have done a wonderful job of simplifying Rule 45's confusing language and converting its impenetrable structure into something that can now be readily understood. This necessarily means, however, that proposed Rule 45(c)(1) is itself easy to understand. Indeed, it could not be more straightforward. Proposed Rule 45(c)(1) provides with unmistakable clarity for the service of a deposition subpoena on parties and officers of parties, as well as on non-parties. And, it states with equal clarity that such a subpoena may command a party or party's officer to appear for a deposition in only one of two places: (1) within 100 miles of his residence, place of employment, or the place where he regularly transacts business or (2) within the state where one or more of these requirements is met.

Granted, a court confronting an issue regarding the location of a party's deposition might conclude that proposed amended Rule 45(c)(1) is inapplicable to party depositions and choose instead to apply the Rule 30 jurisprudence that has developed over the years. In so ruling, however, the court would have to conclude that amended Rule 45(c)(1) was not intended to repeal the Rule 30 jurisprudence by implication. That conclusion, however, would seem to be at odds with the plain language of the proposed new rule. The court would have to ask itself: why would the proposed new rule so clearly provide for subpoenas of party deponents if the drafters intended to retain the existing Rule 30 jurisprudence? Why, the court would have to ask itself, would a party seeking to depose another party ever utilize a subpoena to accomplish this purpose when he could instead invoke Rule 30? The court, upon asking these questions, may then be reluctant to conclude that the language in amended Rule 45(c)(1) is nothing more than mere surplusage.

In our view, the courts should not be put in the position of having to decide whether amended Rule 45(c)(1) was intended to repeal the Rule 30 jurisprudence by implication. We believe it is better that lawyers and courts clearly understand, as they do now, that party depositions are governed by Rule 30.

Our Proposed Change

We would change proposed Rule 45(c) by deleting those portions in paragraph (1) that state that a "person" subpoenaed includes "a party or party's officer." In addition, we would add a paragraph (3) that would provide that the deposition of a party is governed by Rule 30 and that a trial subpoena served on a party must comply with paragraph (c)(1).[4] We propose to leave paragraph (2) of the proposed rule intact. Our suggested amended Rule 45(c) states:

> **c. Place of Compliance.**
>
> (1) ***For a Trial, Hearing, or Deposition***. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

[4] If these changes were made, proposed Rule 45(d)(2(B)(ii) would also have to be changed to remove the reference to a party. We would, in that subparagraph, substitute "the person" for "a person who is neither a party nor party's officer."

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, tangible things, or electronically stored information at a place reasonably convenient for the person who is commanded to produce; and

(B) inspection of premises, at the premises to be inspected.

(3) ***Subpoena of a Party***. The place of compliance for the deposition of a party is governed by Rule 30. A party may be commanded to appear at trial only if the party is served by a subpoena that complies with the provisions of subparagraph (1).[5]

These changes would make it clear that party depositions are governed by Rule 30. Existing jurisprudence on this issue, which serves litigants well, thus would remain intact.

The Committee appreciates the opportunity to offer these comments for consideration by the Committee on Rules of Practice and Procedure.

Sincerely,

L. Joseph Loveland, Jr.
Chair, Federal Rules of Civil Procedure Committee

cc: Board of Regents
Federal Rules of Civil Procedure Committee

[5] If these changes were made, and if the Advisory Committee's alternative Rule 45(c)(3) were also adopted, the two provisions would need to be combined.