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September 8, 2011

Hon. Lee H. Rosenthal
Chair, Standing Committee on Rules of Practice and Procedure
Committee on Rules of Practice and Procedure
Of the Judicial Conference of the United States
Washington, DC 20544

Re: Comments and Suggested Edits Concerning the Proposed Amendments to Fed. R. Civ. P. 45 Concerning Compelling Party Testimony At Trial

Judge Rosenthal:

The proposed 2011 amendments to Federal Rule of Civil Procedure 45 further undermine the fundamental purpose of the Seventh Amendment's guarantee to trial by jury, in favor of trial by deposition. Long established jurisprudence on the limits of a court's power to command parties to appear before it to stand trial for their alleged wrongs—and for those whose reputations and fortunes have been put in jeopardy, to cross-examine their accusers at those trials—already tells us when it is fair to command a party to attend a trial in person. The standard that the rule should reflect should be a simple one: If the court has personal jurisdiction over the parties, then either side should be able to require his opponent to stand before the jury at trial and be judged. Well-meaning rules that fail to allow parties to be judged in person by jurors cheapen our commitment to the jury system and ultimately undermine the political legitimacy and significance of the federal courts.

In 1996 this Committee recognized, "The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling." Fed. R. Civ. P. 43, Advisory Committee Notes, 1996 Amendment. Amendments to, or case interpretations of, Rule 45 that do not allow a party to compel his opponent to undergo the "trial" of his case foster a disregard for the truth.

Reading or replaying at trial party depositions is no adequate substitute. Parties and their counsel at depositions routinely do or say things to avoid or parse the truth that they would never attempt before a judge and jury. Furthermore, depositions often must be taken before all witness are located, interviewed or deposed, or before all documents are disclosed or compelled. If out-of-state parties more than 100 miles distant from the Courthouse need not attend trial, then even if their depositions have been taken they often will escape having to answer all the evidence that could confront them at trial. This undermines public confidence in the integrity of federal court verdicts, which should reflect "the truth" on all the evidence, not just that available at the time of deposition.

Curiously, under the proposed amendment to Rule 45, counsel for parties who are more than 100 miles distant from court will be able to read their own clients' deposition in evidence because they will be beyond the reach of a subpoena for trial, even if their absence was procured at the behest of that counsel. *Compare* Fed. R. Civ. P. 32(a)(4)(D) with 32(a)(4)(B). Under the amendment they will be beyond a parties' subpoena power, even though, under Federal Rule of Civil Procedure 16(a), the Court can require "unrepresented parties" to appear before it for a pre-trial conference. United States nationals in foreign countries, much farther from the courthouse than 100 miles, can be compelled to attend by statute, 28 U.S.C. § 1783, but under the proposal citizens within our nation's boarders could not.

Moreover, under Federal Rule of Civil Procedure 16(c)(1) even represented parties can be required to appear before the Court to discuss settlement. Why then would a subpoena rule be written that excused certain parties from in-person attendance at trial when the court can require them to appear for a settlement conference? Reading the Rules in light of the Seventh Amendment should afford the federal courts a degree of authority to compel parties to trial that is at least equal in scope to its authority to compel parties to attend mediation.

The inequity of requiring individuals who are not parties to travel to distant courthouses in order to provide trial testimony merely because they are employed as an "officer" of a legal entity that happens to be a party should be treated as a separate concern.

Rule 45 first should clarify that a "corporate" party may be compelled by subpoena to testify at trial on the same subjects about which they may be compelled to testify at deposition under Federal Rule of Civil Procedure 30(b)(6). To read the Rules to allow one to marshal evidence in search for the truth at deposition that cannot be had at trial contravenes the very essence of the Seventh Amendment guarantee. *Cf.* Fed. R. Civ. P. 32(a)(3) (permitting Rule 30(b)(6) depositions of anyone to be used at trial by adverse parties). If so,[1] then parties have no greater interest in having

[1] If not, then the Rules should be amended, so that something akin to the Rule 30(b)(6) process can be available to compel testimony at trial from legal entities that are parties. *Cf. Square D. Co. .v. Breakers Unlimited, Inc.*, 2009 WL 1702078, *1-*2 (S.D. Ind. June 11, 2009) (holding that court has inherent authority to compel individuals beyond the subpoena reach of Rule 45 to testify at trial as the corporate party itself because they testified as Rule 30(b)(6) deposition witnesses for that party, but only to the extent of that designation, and holding that Court sanction of default judgment and Court's inherent authority, rather than party's subpoena power, was source of that authority) (citing in part David D. Siegel, *Practice Commentaries*, C45-16 (contained in 28 U.S.C.A. Federal Rules of Civil Procedure Rules 38-49 (2008))); *Fausto v. Credigy Servs. Corp.*, No. C 07-05658 JW, 2009 WL 701012, *1 (N.D. Cal Mar. 11, 2009) (court compelled individual officer of corporate defendant, who testified as Rule 30(b)(6) corporate representative at

"officers" of corporate opponents testify at trial than they do other individual witnesses who may reside outside the state or reside more than 100 miles from court. Second, if such "officers" truly have a greater role in the action that attendance at trial is required for justice to be served, then Rule 20 jurisprudence should provide the solution. If those individual officers should be made parties and personal jurisdiction exists, then so long as the rules are drafted or interpreted to allow the attendance of parties to be compelled at trial that will address the need to bring highly involved officers to account before the jury.

The following subsection (C) should be added to the proposed draft Rule 45(c)(1) after Rule 45(c)(1)(B):

> **(C)** within the United States, or without the United States pursuant to 28 U.S.C. § 1783, for a trial in the action where
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> (i) the person is an individual who is a party to the action;
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> (ii) the person is a public or private corporation, a partnership, an association, a governmental agency, or other entity which is a party to the action as to matters for examination at trial described with reasonable particularity in the subpoena; and as to which the party organization (a) must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify

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deposition, to testify in person at trial because he was held to be "a party to this litigation" to whom the subpoena requirement of Rule 45 did not apply); *Chao v. Tyson Foods, Inc.*, 255 F.R.D. 556, 557-59 & n.2 (N.D. Ala. 2009) (not reaching issue whether witnesses who testified as Rule 30(b)(6) deposition designees become a "party" who can be compelled to testify at trial because Rule 45 did not permit court to compel even parties to appear at trial who were beyond its geographic reach and adopting "minority" view); *Hill v. Nat'l R.R. Passenger Corp.*, No. Civ. A. No. 88-5277, 1989 WL 87621, *1 (E.D. La. July 8, 1989) (Rule 45 does not permit subpoena of defendant for trial testimony on thirteen designated areas of inquiry as it could have had plaintiff sought the same testimony under Rule 30(b)(6) at deposition). Courts that interpret the Rules so that parties, despite the Court's personal jurisdiction over them, cannot be compelled to attend trial when outside the state or more than 100 miles from the courthouse encourage gamesmanship. *Cf. R.B. Matthews, Inc. v. Transamerica Transp. Servs., Inc.*, 945 F.2d 269, 272 (9th Cir. 1991) (where plaintiff is forced to present testimony of defendant's witnesses who were beyond geographical reach of Rule 45 through deposition, district court did not abuse its discretion in precluding defendant from calling those witnesses to testify live); *Armenian Assembly of Am., Inc. v. Cafesjian*, 746 F. Supp. 2d 55, 62 (D.D.C. 2010) (so long as parties are tagged with a subpoena while within geographical limits of Rule 45 they may be compelled to attend trial, even if travel from their residence would be from more than 100 miles away in a different state).

on its behalf, (b) may set out the matters on which each person designated will testify, and (c) must testify about information known or reasonably available to the party organization; or

(iii) the person provided deposition testimony pursuant to Rule 30(b)(6) on behalf of a party to the action, or a former party to the action over which the court had jurisdiction, to the extent that the subpoena is limited to matters as to which that person was designated to testify pursuant to Rule 30(b)(6).

Thank you for your consideration.

Sincerely,

/s/ *Matthew J. Walko*

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