11-CV-016

Comments to Rule 45
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2 Attachments

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On Behalf of LACBA Litigation Section Chair Vince Herron:

Dear Mr. McCabe:

The Litigation Section of the Los Angeles County Bar Association ("Litigation Section") respectfully submits the attached comments on the amendments to Rule 45 of the Federal Rules of Civil Procedure proposed by the Judicial
Conference Advisory Committee on the Civil Rules ("Federal Rules Committee" or "Committee"), as reflected in its May 2, 2011 report (as revised June 16, 2011) ("Report"). The Litigation Section appreciates thought and effort that is
reflected in the Committee's Report, and offers these comments in the hope that they may be of assistance. We would be pleased to provide further analysis in support of these comments upon request.

Sincerely,

Vince Herron
Chair, LACBA Litigation Section

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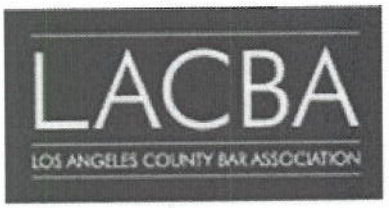

LOS ANGELES COUNTY BAR ASSOCIATION

LITIGATION SECTION

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February 1, 2012

BY U.S. MAIL AND EMAIL
Mr. Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-180
Washington, D.C. 20544
Rules_Comments@ao.uscourts.gov

Re: Comments on Proposed Revisions to Federal Rule of Civil Procedure 45

Dear Mr. McCabe:

The Litigation Section of the Los Angeles County Bar Association ("Litigation Section") respectfully submits these comments on the amendments to Rule 45 of the Federal Rules of Civil Procedure proposed by the Judicial Conference Advisory Committee on the Civil Rules ("Federal Rules Committee" or "Committee"), as reflected in its May 2, 2011 report (as revised June 16, 2011) ("Report"). The Litigation Section appreciates thought and effort that is reflected in the Committee's Report, and offers these comments in the hope that they may be of assistance. We would be pleased to provide further analysis in support of these comments upon request.

The Litigation Section has over two thousand members. It is among the largest sections of the Los Angeles County Bar Association ("LACBA"), which is one of the largest voluntary metropolitan bar associations in the country. These comments were prepared, reviewed and approved by the Litigation Section's Executive Committee, whose members include lawyers from a wide variety of practice areas, as well as state and federal judges.[1] The comments incorporate the views of lawyers from both the plaintiff and defense bars, and lawyers who primarily represent individuals and those who primarily represent entities of all sizes, including the largest corporations. The Litigation Section's Executive Committee has broad experience in the federal courts, and a deep understanding of both the theoretical principles underlying the federal rules and the practical effects of their application.

These comments are made on behalf of the Litigation Section only. They have not been reviewed or approved by LACBA's Board of Trustees or by any other section, committee or other part of LACBA. Accordingly, these comments do not necessarily represent the views of LACBA as a whole, or the views of any other section, committee or other part of LACBA.

[1]The Litigation Section is grateful for the input received from the bench in the preparation of these comments. However, these comments should not be construed to represent the views of any state or federal judge.

Compelling attendance of a party at trial: The Federal Rules Committee's proposed amendment resolves an ambiguity in the rules regarding whether a party or party's officer in a remote forum may be compelled to testify at trial. We agree with the Committee that the existing rule is ambiguous and should be clarified. Contrary to the Committee's proposal, however, we believe that a district court should be permitted, upon a showing of good cause, to order a party to appear and testify at trial, or to produce an officer to testify, even if the party or officer is located outside the geographical limits otherwise specified in Rule 45. Thus, we support the Committee's alternate proposal for Rule 45(c)(3) as set forth in the Appendix to the Committee's report, as modified as follows:

> ***Order to a Party to Testify at Trial or to Produce An Officer to Testify At Trial.*** Despite Rule 45(c)(1)(A), 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. [The court] may order that the party or officer be reasonably compensated for expenses incurred in attending the trial. The court may impose the sanctions authorized by Rule 37(b) on the party subject to the order if the order is not obeyed.

We do not believe that the geographic limits in Rule 45 should be rigidly applied to parties. Those limits are meant to protect third-party witnesses "from being subjected to excessive discovery burdens in litigation in which they have little or no interest." *In re Edelman*, 295 F.3d 171, 178 (2d Cir. 2002). "Parties to a suit have great interest in its outcome; therefore, the purpose behind [the geographic limits] does not apply to them." *Clark v. Wilkin*, 2008 WL 648542 (D. Utah Mar. 10, 2008). "Further, other parties and the Court have an interest in the appearance of parties at trial" which is generally greater than the interest in the appearance of non-parties. *Id.* In our view, it is critical for the court to have the flexibility to order a party or an officer of a party who is outside of the territorial limits set forth in Rule 45 to appear at trial as part of its overall supervisory authority.

By imposing a blanket rule that would apparently prohibit a court from ever compelling a party outside of geographic limits of Rule 45 to testify at trial, the Committee's proposed rule would interfere with the jurisdiction of the district courts. A subpoena is a form of process by which a court obtains jurisdiction over a person or entity. *See* Siegel, *Supplementary Practice Commentaries*, 28 U.S.C.A. Rule 45, Federal Rules of Civil Procedure, at C45-1. But the district court has already obtained jurisdiction over the parties to the litigation, and thus no Rule 45 subpoena should be necessary for a court to compel a party to appear at trial. The plaintiff has submitted to the court's jurisdiction by filing the action, and the court acquires jurisdiction over the defendant by virtue of the summons served under Rule 4. Just as a court can order a party to appear for a settlement conference or a deposition without serving a new summons or subpoena, the court should have the authority to order a party subject to its jurisdiction to appear and testify at trial. There may be reasons in particular instances in which the court declines to exercise that authority, but it would be inappropriate for a rule to preclude the exercise of that authority in all instances. *See, e.g.,* Fed. R. Civ. Proc. 82 ("These rules do not extend or limit the jurisdiction of the district courts . . . ."); *see also Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 715 (1982) (Powell, J., concurring) (Rule 82 applies to the court's *in personam* jurisdiction).

A court does not automatically obtain jurisdiction over a corporate officer by virtue of its jurisdiction over the corporate party, and thus the analysis is slightly different for party officers than for the parties themselves. But corporations that are subject to the personal jurisdiction of the district court are often required to produce officers or managing agents for depositions in distant forums. *See, e.g., Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358 (7th Cir. 1985); *In re Outsidewall Tire Litigation*, 267 F.R.D. 466, 470 (E.D. Va. 2010). Indeed, some courts have recognized a "general rule that the proper location of a plaintiff's deposition, including that of a corporate officer if the plaintiff is a corporation, is the forum where the litigation is pending." *See, e.g., Scooter Store, Inc. v. Spinlife.com, LLC*, 2011 WL 2118765 (S.D. Ohio May 25, 2011); *see also El Camino Resources Ltd. v. Huntington Nat'l Bank*, 2008 WL 2557596, at *3 (W.D. Mich. June 20, 2008); *In re Outsidewall Tire Litigation*, 267 F.R.D. at 471 (to overcome presumption that forum is proper place of plaintiff's deposition, plaintiff must show that "requiring him to travel to the forum district for his deposition would, for physical and financial reasons, be practically impossible, or that it would be otherwise fundamentally unfair.") A court's power to order a party to produce its officers at *trial* should be at least as great as its power with respect to its power to order a party's officer to appear at a *deposition*. While there is rarely a compelling reason that *requires* a deposition to take place in the forum, a witness's presence at trial could have a profound effect on the presentation of evidence in a case, and on the jury's understanding and determination of the issues. Thus, the court and the parties have an even greater interest in the ability to compel a witness to appear in the forum for a trial than for a deposition, but the proposed rule would give less weight to that interest.

The Federal Rules Committee has expressed its concern that "allowing subpoenas on an adverse party or its officers without regard to the geographical limits" otherwise contained in the rule "would raise a risk of tactical use of a subpoena to apply inappropriate pressure to the adverse party." Report at 3. But the risk of harassment or abuse exists with every procedural tool, and the court is able to curb such abuses when necessary. In any event, the potential for such abuse does not justify the imposition of a blanket rule that would prohibit a court from compelling a party to appear in all circumstances. The district court is in the best position to determine whether there is a genuine need for the testimony of a particular witness, or whether a party is demanding the presence of a particular witness to gain a tactical advantage unrelated to the merits. Courts routinely grant protective orders to prevent depositions of high-ranking corporate or government officials with no personal knowledge of the facts involved, and routinely quash harassing trial subpoenas when served on witnesses within the geographical reach of Rule 45. *See, e.g., Thomas v. International Business Machines*, 48 F.3d 478, 483 (10th Cir. 1995)*; In re United States*, 985 F.2d 510, 513 (11th Cir. 1993). The good cause requirement will adequately protect parties and their officers from abuses.

The Federal Rules Committee's Report notes that there may be alternative means of obtaining the testimony of a party or officer, such as through audiovisual recording of deposition testimony, and through contemporaneous transmission of testimony through electronic means. While such alternatives may be acceptable in some circumstances (such as where the witness's testimony is relevant to tangential issues only), they generally do not constitute an adequate substitute for the witness's live testimony before a jury. A jury is better able to judge the credibility and demeanor of a witness who testifies live in the courtroom, and a live witness is more likely to retain the jury's attention. It is especially difficult for juries to digest highly complex, technical testimony when it is presented by way of a videotaped deposition or remote testimony.

Moreover, the availability of such alternatives is just one of many important considerations necessary for determining whether a party or party officer otherwise outside the geographical reach of Rule 45 should be compelled to testify at trial. Among other things, a court might consider the importance of the witness's testimony, the burden on the witness in traveling to the forum, the witness's contacts with the forum, the extent of the witness's involvement in the litigation and the underlying events, the amount at stake in the litigation, the length and complexity of the witness's testimony, and a number of other factors. Accordingly, we do not favor the inclusion of the following language contained in the alternate version of Rule 45(c)(3): "In deciding whether to enter such an order, the court must consider the alternative of an audiovisual deposition under Rule 30 or testimony by contemporaneous transmission under Rule 43(a)." Highlighting only that factor to the exclusion of all others would tend to give it undue importance in the court's overall assessment. Rather, in any motion involving this issue, we believe that the court should have the flexibility to consider all of the pertinent facts and circumstances in balancing the need for the live appearance of the witness against the burdens that requiring such an appearance would impose.

The Litigation Section takes no position as to the procedure to be followed for the issuance of subpoenas for appearance at trial to parties or the officers of parties outside the geographic scope of Rule 45, except that some degree of court supervision over the process is indicated. For example, the Litigation Section takes no position on which party should bear the responsibility of filing any motion in this context, or which party should bear the burden of proof on any such motion.

Transfer of enforcement motion to court where action is pending: The Federal Rules Committee's proposed rule provides that an enforcing court may transfer a motion to the court where the action is pending "if the parties and the person subject to the subpoena consent, or if the court finds exceptional circumstances." Proposed Rule 45(f). We have two concerns about this proposed rule. First, we believe that the enforcing court should be permitted to transfer the motion so long as the subpoena recipient consents, regardless whether any party objects. To the extent the motion bears upon the merits of the action or the parties' rights, the court in which the action is pending is in the best position to rule upon it. The sole reasons for the involvement of the remote district court are (1) to ensure that the court enforcing the subpoena has personal jurisdiction over the third party, and (2) to ensure that any local burdens that the subpoena may impose upon the third party are properly considered. The parties themselves have no legitimate interest in having a dispute in a pending case heard in a distant forum, and thus have no standing to object to the transfer of the motion.

Second, we believe that the "exceptional circumstances" standard imposes too high a bar to transfer. There are many common circumstances in which the court with jurisdiction over the underlying case will be in the best position to rule on the motion regarding the subpoena, and in the absence of local issues, the judge in the remote forum will often prefer to have the judge who is familiar with the case, the lawyers and prior discovery disputes decide the enforcement issues. For example, a claim that a subpoena is unduly burdensome often requires the court to weigh the burden on the producing party against the likely relevance of the material to be produced. Or, such motion may turn on the interpretation of a prior order of the court. The court in which the action is pending will generally be in a better position to make such judgments. The "exceptional circumstances" standard in the proposed rule would presumably prevent transfer in

these common circumstances. We believe that the rule should impose a "good cause" standard instead.

Notice of compliance: The Federal Rules Committee has declined to impose further notice requirements in the proposed amendments, but has asked for comments on whether a party issuing a subpoena should be required to give notice of any production received in response to it. We believe that such notice should be required. The failure to inform other parties that a production has been received is a common source of disagreement among the parties, and the failure of the issuing party to share the fruits of the subpoena with other parties often gives rise to unnecessary discovery disputes.

The rules should clearly specify the duties of the issuing party. Every party who issues a subpoena should be required to notify other parties when a production has been made and to make available copies of the data and documents produced, unless there are privilege issues that justify their withholding. In addition, the issuing party should be required to notify other parties of any agreement to narrow the subpoena or otherwise alter its scope. Requiring such notice will allow opposing parties to serve supplemental subpoenas when necessary, without burdening third parties with unnecessary duplicative subpoenas.

Issuing court as court in which the action is pending: Finally, in an effort to simplify Rule 45, the Federal Rules Committee proposes that the issuing court for all subpoenas – even those requiring attendance at a deposition in a remote forum – be the court in which the action is pending. While we applaud the Committee's effort to simplify Rule 45, we are concerned that requiring all subpoenas to issue from the court in which the action is pending could give rise to some complicated jurisdictional questions, and for that reason we oppose the change.

As a general rule, "the subpoena power of a court cannot be more extensive than its jurisdiction," and a subpoena that is beyond the scope of a court's jurisdiction is void *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) (concerning subject matter jurisdiction). At least some courts have applied this rule in the personal jurisdiction context. *See, e.g., Estate of Ungar v. Palestianian Authority*, 400 F. Supp. 2d 541, 548 (S.D.N.Y. 2005). We believe that the scope of the issuing court's personal jurisdiction could potentially raise complicated questions, particularly in diversity cases. A district court sitting in diversity can exercise personal jurisdiction over a party only when, among other things, the party has sufficient minimum contacts with the forum state. *See Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985). Although it is not entirely clear, there is at least a colorable argument that this test applies to the issuance of a subpoena. *See, e.g., Application to Enforce Administrative Subpoena Duces Tecum of S.E.C. v. Knowles*, 87 F.3d 413, 417-18 (10th Cir. 1996) (constitutional limits on the exercise of personal jurisdiction apply to subpoenas); *U.S. v. First National City Bank,* 396 F.2d 897 (2d Cir. 1968) (court must have personal jurisdiction over person in order to exercise its subpoena power). Recipients of third party subpoenas often lack minimum contacts with the state in which the action is pending, and thus, the issuing court will often lack personal jurisdiction over third parties who possess relevant information. The potential problem is this: Could a recipient of a subpoena from an issuing court that lacks jurisdiction over the recipient simply ignore the subpoena? Would the enforcing court have to quash the subpoena if the issuing court lacked personal jurisdiction? The answer may be that it is the enforcing court, not the issuing court, that is actually exercising jurisdiction over the

subpoenaed party. If that is the case, the subpoena should be issued in the name of the court whose jurisdiction is being invoked.

The benefits from having all subpoenas issue from the court in which the action is pending are minimal under the proposed rule. The parties will have to litigate in a remote court to enforce the subpoenas. Given the potential jurisdictional issues, we do not believe the change is warranted.

* * *

The Litigation Section commends the dedication and hard work of the Federal Rules Committee, and is grateful for the opportunity to present these comments. We would be pleased to provide any follow up information that may be required by the Committee. We wish you all the best as you continue these important deliberations.

Sincerely,

Vince Herron
Chair, LACBA Litigation Section