U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

11-CV-020

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Dear Sir or Madam:

The Equal Employment Opportunity Commission (EEOC) submits the following comments on the Civil Rules Advisory Committee's proposed amendments to Fed. R. Civ. P. 45. EEOC enforces five federal employment discrimination statutes: Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, Title I of the Americans with Disabilities Act of 1990, and Title II of the Genetic Information Nondiscrimination Act of 2008. We have approximately 400 suits pending in federal district courts throughout the United States.

1. EEOC believes the amended Rule is better organized and easier to understand than the current Rule, and apart from the comments below agrees with the proposed substantive changes.

2. EEOC believes the revised notice provision (45(a)(4)) should also require notice of modifications to the subpoena and notice of initial receipt of any materials produced. Contrary to the concerns expressed in the Draft Minutes of the April 4-5, 2011, Committee meeting, we view these as very slight burdens on the party serving the subpoena – particularly compared to the burden on other parties of making repeated requests for such information – and do not think they will add any appreciable complexity to the rule. Requiring notice only of initial production eliminates any concern over how to apply the requirement to "rolling production," while still alerting other parties to the fact that production is occurring and therefore giving them the opportunity to obtain the information in a timely manner. The statement in the proposed Advisory Committee Note that the party serving the subpoena should make reasonable provision for prompt access will do little to alleviate what we believe will be the major problem faced by the nonserving parties: failure by the serving party to respond to inquiries regarding whether production has occurred. There is no apparent remedy for such nonresponses (which naturally require only inaction on the serving attorney's part), whereas a requirement in the Rule that notice of initial production be provided could easily be enforced. EEOC believes that nonresponses to inquiries about production, not possible "gotcha" disputes – which should not occur anyway with well defined notice requirements such as "___ calendar days from first receipt of production [modification of the subpoena]" – should be the Committee's primary concern.

3. On the new transfer provision (45(f)), EEOC believes consent of the person subpoenaed should be sufficient to permit transfer without any additional showing. There may be

situations where a party has close connections to the area where compliance is required, but generally, local interests will relate only to the person subpoenaed. Further, a party's connection to the area where compliance is required seems a fortuitous circumstance that shouldn't be a factor in the determination of which court should decide a matter that but for the location of the person subpoenaed would, like every other contested issue in the case, be decided by the court where the suit was filed.

EEOC believes that the "exceptional circumstances" requirement for transfer should be replaced by the considerations in the prior draft rule: "the convenience of the person subject to the subpoena, the interest of the parties, and the interests of effective case management." The last should be the primary consideration, as the parties by definition have a connection to the issuing court, and the party moving for transfer can be required to compensate the person subpoenaed for any additional expense incurred. Where a subpoena-related motion may affect the merits of the action, the issuing court not only has a strong interest in deciding the matter, but is in a much better position to do so than a court with no prior knowledge of the case. Further, similar issues may arise with individuals located in various jurisdictions, creating the risk of both inconsistent and less informed rulings. In EEOC suits, for example, Agency employees and former employees located outside the Rule 45(c) boundaries of the issuing court often are subpoenaed for deposition (and sometimes trial) testimony, and normally the same privilege issues (governmental deliberative process and sometimes attorney-client) will arise on each occasion.

Finally, even if courts construe "exceptional circumstances" in Rule 45(f) more expansively than has been the case with other rules where that term is used – in our experience, discovery from consulting experts (Rule 26(b)(4)(D)(ii)) is almost never permitted (and rarely attempted), and we believe the same likely will be true regarding the imposition of sanctions for loss of electronically stored information through the routine, good faith operations of an information system (Rule 37(e)) – those words connote a much higher standard than should be necessary to permit the court presiding over a suit to decide important discovery issues arising in the case, particularly where there are numerous means of reducing the burden on the local nonparty affected, who in many instances may not even need to appear personally before the issuing court deciding the matter.

4. EEOC believes the Committee's proposal should include authority to require parties or their officers located outside the Rule 45(c)(1) boundaries to appear and testify at trial, and we think that Rule 45(c)(3) in the appendix to the proposed Advisory Committee Notes is appropriate for this purpose. The "good cause" requirement in Rule 45(c)(3) should obviate any concern that such authority will be abused. (The Committee's statements that in many cases a party's other employees may be better witnesses than its officers about the matters in dispute in the case assume both that the appearance of such employees can be compelled under Rule 45(c)(1), and that parties will subpoena other parties' officers for improper reasons, i.e., knowing that other employees have more knowledge than the opposing party's officers, attorneys will subpoena the officers

Rule 45(c)(3) requires as one alternative to ordering a party's or officer's appearance consideration of contemporaneous transmission under Rule 43(a). Although EEOC doesn't disagree with this approach, we think that in deciding whether to include Rule 45(c)(3) the Committee should give appropriate weight to the reasons stated in the Advisory Committee Note to the 1996 amendments to Rule 43 (particularly the third paragraph of the Note) for the importance of in-person testimony at trial.

It is common practice at trial for plaintiffs to call adverse parties or their employees as part of the presentation of their cases, often as the very first witness(es). Without going into the many -- clearly appropriate -- tactical reasons for this approach by the party with the burden of proof, it cannot be done unless the party or employee is in the courtroom.

Thank you for the opportunity to comment.

Sincerely,

P. David Lopez
General Counsel