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10 **IN THE SUPREME COURT**
11 **STATE OF ARIZONA**
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PETITION TO AMEND RULE
45(b)(1), ARIZONA RULES OF
CIVIL PROCEDURE, AND
ADOPT A NEW RULE 45.1

Supreme Court No. R-12-0022

**Comment of the State Bar of Arizona
on Petition to Amend Rule 45(b)(1),
Arizona Rules of Civil Procedure, and
Adopt a New Rule 45.1**

The State Bar of Arizona believes that the petition's proposed new Rule 45.1 would be a significant improvement over Arizona Rule of Civil Procedure 30(h), which currently governs the procedures for obtaining a subpoena to take discovery in Arizona for an out-of-state civil proceeding. As discussed below, however, the State Bar believes that parts of the proposed rule need minor modifications to clarify certain terms and procedures and to conform the proposed rule with the terminology, format, and procedures found elsewhere in the Arizona Rules of Civil Procedure. The State Bar's suggested changes to the petitioners' proposed rule are shown in Appendix A.

The State Bar also agrees with the petitioners that if Rule 45.1 is adopted, Rule 45(b)(1) of the Arizona Rules of Civil Procedure should be amended to clarify that a deposition subpoena for an out-of-state civil proceeding is to be issued from the superior court in the county where the discovery would be

1 conducted. Petitioners' proposal, however, mistakenly modifies the first sentence
2 in Rule 45(b)(1), which pertains to hearing and trial subpoenas, rather than the
3 second sentence, which pertains to deposition subpoenas. Suggested changes to
4 correct this oversight are shown in Appendix B.

5 Lastly, if Rule 45.1 is adopted, existing Rule 30(h) of the Arizona Rules of
6 Civil Procedure should be abrogated. A proposal to accomplish that is attached in
7 Appendix C.

8 DISCUSSION

9 **I. Proposed New Rule 45.1 Would Be an Improvement Over the Existing Rule.**

10 **A. The Proposed Rule's Potential Benefits.**

11 Currently, obtaining a subpoena for taking discovery in Arizona for an out-
12 of-state civil proceeding is governed by Rule 30(h) of the Arizona Rules of Civil
13 Procedure. When a party in an out-of-state case wants a subpoena issued in
14 Arizona, Rule 30(h) requires the party to file an application with the superior court
15 "as a civil action" asking for the issuance of the subpoena. Ariz. R. Civ. P. 30(h).
16 Among other things, the application must reference the law of the other jurisdiction
17 that authorizes the discovery, and must attach a certified copy of the notice of
18 taking deposition or other papers that are necessary under the laws of the foreign
19 jurisdiction to take the discovery in Arizona. Ariz. R. Civ. P. 30(h), subparts (b),
20 (c). With the filing of the application, the clerk issues a subpoena. Ariz. R. Civ. P.
21 30(h). Typically (and consistent with Ariz. R. Civ. P. 45(a)(2)), the clerk issues
22 the subpoena in blank, and it is then filled out by the requesting party. The rule
23 also requires the requesting party to file an affidavit of service certifying that the
24 application has been served on all other parties to the action. Ariz. R. Civ. P. 30(h).

25 In the State Bar's view, proposed Rule 45.1 would be a significant
26 improvement over Rule 30(h) in the following respects:

1 **First**, it would provide a cheaper and less complicated means of obtaining a
2 subpoena to take discovery in Arizona for use in an out-of-state civil proceeding.
3 Unlike Rule 30(h), it would not require the requesting party to file an application
4 with a court before obtaining a subpoena. Instead, all a party would be required to
5 do is present a foreign subpoena to the clerk, thereby eliminating the need to retain
6 local counsel to make a court filing. As in federal court, nothing would need to be
7 filed unless (and until) a motion to compel or a motion to quash is brought. As
8 such motions are rare, parties in out-of-state civil proceedings would be able to
9 avoid the cost of retaining local counsel in most cases.

10 **Second**, adopting proposed Rule 45.1 would lessen the burden on the clerks'
11 offices. Currently, once a case matter is opened with the filing of an application
12 under Rule 30(h), clerks' offices generally treat the matter like any other civil case.
13 That includes monitoring the matter after its filing for compliance with rule-based
14 deadlines, including whether it should be placed on the inactive calendar under
15 Arizona Rule of Civil Procedure 38.1. Matters brought under Rule 30(h),
16 however, seldom involve court intervention to resolve discovery issues and almost
17 always stop being active once the requested discovery is taken. As such, no reason
18 exists for the clerks' offices to manage these matters unless (and until) a motion is
19 brought either to enforce the subpoena or to quash or modify it.

20 **Third**, the proposed rule would eliminate confusion over what a Rule 30(h)
21 application must say and what must be attached to it. Rule 30(h) attempts to
22 accommodate civil proceedings in other jurisdictions by allowing discovery in
23 Arizona if taking out-of-state discovery is authorized in the foreign jurisdiction.
24 Ariz. R. Civ. P. 30(h), subpart (b). But it sometimes can be hard to find the
25 authority in a foreign jurisdiction that specifically authorizes out-of-state
26 discovery, and it is not always clear what has to be attached to the application. For

1 example, it can be hard to determine whether it is necessary, under the rules of the
2 foreign jurisdiction, to attach letters rogatory, a commission, or a deposition notice
3 as the document authorizing the discovery. In contrast, proposed Rule 45.1 merely
4 would require the presentation to the clerk of a subpoena that would be valid in the
5 foreign jurisdiction, a procedure with which out-of-state practitioners would
6 already be familiar.

7 *Fourth*, the proposed rule would clear up a small gap in Rule 30(h)'s
8 coverage. Rule 30(h) permits the issuance of subpoenas in connection with
9 depositions and document requests, but does not explicitly authorize the issuance
10 of a subpoena for the purpose of inspecting the recipient's premises. In contrast,
11 Rule 45 allows a subpoena to be issued for that purpose if an action is pending in
12 Arizona. Ariz. R. Civ. P. 45(a)(1)(C)(iii). There is no principled reason why the
13 issuance of a subpoena should not also be authorized for that purpose if it is in
14 connection with an out-of-state civil proceeding.

15 **B. The Proposed Rule's Drawbacks.**

16 Although the benefits of the petitioners' proposed rule are significant, it also
17 has one significant drawback—it would increase a subpoena recipient's costs in
18 bringing a motion to quash or modify a subpoena. To achieve its cost-saving
19 benefits, the proposed rule would defer any court filings with respect to a subpoena
20 until a later motion is brought to enforce, or to seek relief from, the subpoena. As
21 proposed, Rule 45.1(f) does not explain how such a motion would be presented to
22 a court if there is not already a pending civil action in which to file it, but, as is
23 discussed *infra* (at 12), it likely would require the motion to be filed as a separate
24 civil action.

25 Thus, if a subpoena recipient decides to seek relief through a motion to
26 quash or modify the subpoena, he or she would need to file the motion as a civil

1 action in order for the motion to be docketed and assigned to a judge, triggering at
2 least a \$196 filing fee. *See* A.R.S. § 12-284 (\$166 fee for “Filing complaint or
3 petition”); A.R.S. § 12-284.01 (\$15 fee for the Document Storage and Retrieval
4 Fund); A.R.S. § 12-115 (\$15 fee for the Arizona Lengthy Trial Fund).¹ In contrast,
5 under Rule 30(h), a non-party subpoena recipient would not be required to pay
6 such fees to bring a motion for relief because the party serving the subpoena
7 already has initiated a civil action under the rule in order to obtain the subpoena.
8 Ariz. R. Civ. P. 30(h) (application for subpoena filed “as a civil action”). As such,
9 it can be argued that the proposed rule would unfairly burden subpoena recipients
10 by shifting the filing fees from the party serving the subpoena to the subpoena
11 recipient.²

12 Rule 45, which proposed Rule 45.1(e) incorporates by reference, provides a
13 partial solution to this concern. If a court grants a subpoena recipient’s motion and
14 finds that the serving party breached his or her duty to “avoid imposing undue
15 burden or expense on” the subpoena recipient, a court would have the power to
16 order the serving party to pay the filing fees, among other expenses. Ariz. R. Civ.
17 P. 45(e)(1) (the sanction “may include, but is not limited to, lost earnings and a
18 reasonable attorneys’ fee”). But this would not eliminate the burden on the

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20 ¹ Counties may charge additional fees. For example, the filing fee in Maricopa County is
21 \$301, which includes the statutory fees mentioned above. *See* Superior Court Filing Fees – For
22 Maricopa County Effective April 15, 2010, <http://www.clerkofcourt.maricopa.gov/fees.asp#civil>
23 (last visited May 15, 2012).

24 ² This would not be an issue if the subpoena seeks only the production of documents. Under
25 Rule 45(c)(5)(B)(i), if a subpoena recipient serves an objection upon the serving party with
26 respect to a subpoena’s documents requests, the subpoena recipient is not required to comply
with the portions of the requests that are subject to the objection absent a court order to do so.
That places the burden on the party serving the subpoena to file a motion seeking the subpoena’s
enforcement. Ariz. R. Civ. P. 45(c)(5)(B)(ii). As such, under the proposed Rule 45.1’s
framework, the serving party would be responsible for paying the filing fee to initiate a civil
proceeding to permit the consideration of the enforcement motion.

1 subpoena recipient to pay the fees when filing his or her motion; and, although the
2 rule makes the award of sanctions mandatory, courts in practice often treat the
3 granting of such awards as discretionary.

4 To the extent this added expense to the subpoena recipient is a concern, the
5 State Bar does not see any simple way to modify the proposed rule in order to
6 address it. Possible solutions might be to waive the filing fees when a subpoena
7 recipient files a motion for relief or to provide that the party serving the subpoena
8 is responsible for the filing fees when such a motion is filed. Alternatively, courts
9 could be given the authority to waive the fees for such motions or to shift the
10 responsibility for filing fees to the serving party. Unfortunately, the filing-fee
11 requirement and a court's power to waive fees are governed by statute; and, as
12 such, it is beyond this Court's authority to make such modifications by court rule.
13 *See* A.R.S. § 12-311 (making a filing fee mandatory “[a]t the commencement of
14 each action or proceeding”); A.R.S. § 12-302(D) (delimiting when a court may
15 waive fees).

16 Another possibility is to suspend a subpoena recipient's obligation to
17 comply with a subpoena if he or she sends a written objection to the serving party,
18 which would force the serving party to file a motion to enforce the subpoena and to
19 pay the required filing fees. But such a rule invites abuse: anyone who would
20 prefer not to testify or wishes (for any reason) to postpone a deposition would have
21 an easy way to do it by merely sending a letter objecting to the subpoena. The
22 adoption of such a procedure also would be a significant departure from Rule 45,
23 and would require, among other things, the adoption of a separate subpoena form
24 in Rule 84 setting forth a modified set of rights and duties of a subpoena recipient.
25 It also likely would be criticized as discriminating against out-of-state litigants, as
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1 it would make subpoenas for out-of-state proceedings potentially easier to evade
2 than a subpoena for an Arizona state court proceeding.

3 **C. Overall, the Proposed Rule's Potential Benefits Outweigh Its**
4 **Drawbacks.**

5 On balance, although the State Bar acknowledges that proposed Rule 45.1
6 would increase a subpoena recipient's costs in seeking relief, it believes that the
7 benefits of the proposed rule outweigh its drawbacks. As noted earlier, it is the
8 rare case in which the issuance of a subpoena results in later motion practice; and,
9 because of that, the proposed rule's overall cost savings to litigants and the courts
10 are likely to be substantially greater than the added expense the proposal may
11 impose on subpoena recipients. Additionally, if a subpoena recipient's motion for
12 relief has merit, most judges likely would be sympathetic to a request under
13 Rule 45(e)(1) to order the serving party to reimburse the movant for some or all of
14 the filing fee. In addition, it is worth noting that the same "shifting of the filing
15 fee" currently occurs in federal court, which also defers the filing of a civil action
16 until a motion is brought over a subpoena and requires a subpoena recipient to pay
17 the federal court filing fee (currently \$350) to open a civil matter in order to permit
18 a motion for relief to be considered.

19 In sum, the State Bar favors, at least on a conceptual level, petitioners'
20 proposed rule change as it would improve the current procedure for obtaining
21 subpoenas to take discovery in Arizona for use in out-of-state civil proceedings.

22 **II. Certain Changes to Proposed Rule 45.1 Should Be Made to**
23 **Clarify Certain Procedures and to Conform the Rule with the**
24 **Other Arizona Rules of Civil Procedure.**

25 Although the petition's proposed rule changes are conceptually sound, the
26 State Bar believes that some of the language in proposed Rule 45.1 should be
modified to conform it with the format and language used elsewhere in the Arizona

1 Rules of Civil Procedure. Additionally, certain other changes need to be made to
2 clarify some of the terms and procedures in proposed Rule 45.1 and to ensure that
3 the rule does not inadvertently authorize the taking of discovery that would not be
4 otherwise permitted under Rule 45. The State Bar's proposed changes are reflected
5 in Appendix A of this comment.

6 The State Bar specifically recommends the following changes to each of the
7 subsections in proposed Rule 45.1:

8 ***Subsection a: "Short Title."*** The State Bar recommends deleting this
9 subsection because no other rule in the Arizona Rules of Civil Procedure has a
10 "short title," and it appears unnecessary. [See Appendix A at 1, lines 2-3 (deleting
11 subsection)]. To the extent that it might be useful to practitioners and the courts to
12 have a cross-reference to the Uniform Act, the State Bar suggests including it in a
13 short comment to the rule, along with a citation as to where a copy of the Uniform
14 Act can be found. The proposed comment set forth in Appendix A contains such a
15 cross-reference. [See *id.* at 3, lines 19-23].

16 ***Subsection b: "Definitions."*** The proposed rule's definitions appear sound.
17 There is, however, one typographical error: the subdivisions in subpart (5) are
18 identified as (i), (ii) and (iii). Consistent with the rest of the rule and the format
19 used elsewhere in the Arizona Rules of Civil Procedure, the subdivisions should be
20 denominated (A), (B) and (C). [See Appendix A at 1, lines 17-21 (renumbered as
21 Rule 45.1(a)(5)(A)-(C))].

22 ***Subsection c: "Issuance of Subpoena."*** The State Bar has seven concerns
23 with this subsection:

24 (1) Subparts (1) and (2) refer to a foreign subpoena being
25 "submitted" to the clerk. It is not clear what that term means, and it could be
26 interpreted as requiring the foreign subpoena to be filed with the clerk or requiring

1 the clerk to otherwise retain a copy. Such a requirement would defeat the proposed
2 rule's purpose, which is to avoid the need to make a court filing to obtain a
3 subpoena. The State Bar suggests using the word "present" in its place, which is
4 the term used in Rule 4(a) of the Arizona Rules of Civil Procedure for obtaining a
5 signed summons from the clerk. [See Appendix A at 1, line 24, and at 2, line 3
6 (renumbered as Rule 45.1(b)(1) & (2))].

7 (2) A mechanism also is needed in Subpart (1) to make it easier for
8 the clerks' offices to identify the requests as being made under Rule 45.1. The
9 comments to the Uniform Act suggest that this be accomplished by a letter from
10 counsel to the clerk. [See Appendix B]. There is nothing in the rule, however, that
11 guarantees that this will be done; and, even if there were such a requirement in the
12 rule, it would add to the procedure's complexity. A simpler way, in the State Bar's
13 view, is to require that the foreign subpoena include the following phrase below
14 the case number: "For the Issuance of an Arizona Subpoena under Ariz. R. Civ. P.
15 45.1." [See Appendix A at 1, line 25 to 2, line 1 (renumbered as Rule 45.1(b)(1))].
16 The addition of that phrase would give the clerks' offices a simple and
17 standardized means of identifying requests under the rule.

18 (3) Subpart (2) refers to the clerk issuing the subpoena, but it is
19 unclear whether the subpoena must be in final form when it is issued. There is no
20 need for that to be done, and the State Bar suggests incorporating the language
21 used in Rule 45(a)(2) of the Arizona Rules of Civil Procedure, which provides that
22 the clerk will issue a "signed but otherwise blank subpoena to the party requesting
23 it, and that party shall complete the subpoena before service." [See Appendix A at
24 2, lines 4-7 (renumbered as Rule 45.1(b)(2))].

25 (4) Subpart (3)(A) requires the subpoena to incorporate "the terms
26 used" in the foreign subpoena. It is unclear what that phrase means—the requested

1 discovery, the definitions provided in the foreign subpoena, or the terms for
2 compliance that are included in the general subpoena form. To avoid ambiguity,
3 the State Bar suggests replacing the phrase with “discovery requested.” [See
4 Appendix A at 2, lines 13-14 (renumbered as Rule 45.1(b)(3)(C))]. It also suggests
5 adding the word “accurately” at the beginning of the clause to make it clear that the
6 intent is to prevent the requesting party from adding something in the Arizona
7 subpoena that was not in the foreign subpoena. [See *id.*].

8 (5) Additionally, to avoid any confusion about how the subpoena
9 should identify the issuing court, the out-of-state action and the case number for
10 that action, the State Bar suggests adding two additional subparts requiring the
11 subpoena to: (i) “state the name of the Arizona court issuing it;” and (ii) “bear the
12 caption and case number of the out-of-state case to which it relates, identifying
13 before the case number the foreign jurisdiction and court where the case is
14 pending.” [See Appendix A at 2, lines 9-12 (shown as Rule 45.1(b)(3)(A) & (B))].
15 California’s version of the Uniform Act contains similar requirements, and
16 adopting them in Arizona would be helpful to practitioners. See Cal. Civ. P. Code
17 § 2900.300(d)(3) & (4).

18 (6) The State Bar also suggests adding a new subpart to this
19 subsection to make it clear that the issued subpoena must be in the form specified
20 in Rule 45(a)(1) (incorporating various witness protections and rights) and other
21 parts of Rule 45 (e.g., notice of videotaping a deposition). [See Appendix A at 2,
22 lines 18-19 (shown as Rule 45.1(b)(3)(E))].

23 (7) The State Bar also suggests adding a new subpart to the
24 subsection to make it clear that even if broader discovery is allowed under the law
25 of a foreign jurisdiction (e.g., RFAs or different territorial limitations on
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1 compliance), the Arizona subpoena must not “exceed[] the discovery authorized in
2 Rule 45.” [See Appendix A at 2, line 20 (shown as Rule 45.1(b)(3)(F))].

3 **Subsection d: “Service of Subpoena.”** To aid practitioners in finding the
4 part of Rule 45 that is referenced in this subsection, the State Bar suggests
5 replacing the reference to “Rule 45” with “Rule 45(d),” which governs the service
6 of a subpoena. [See Appendix A at 2, lines 21-22 (renumbered as Rule 45.1(c))].

7 **Subsection e: “Deposition, Production and Inspection.”** To clarify that
8 depositions and other discovery authorized by the rule are governed by Arizona’s
9 procedural rules and not those of the foreign jurisdiction where the lawsuit is
10 pending, the State Bar recommends adding a second sentence to the subsection:
11 “Depositions and other discovery taken pursuant to this Rule shall be conducted
12 consistent with, and subject to the limitations in, the Arizona Rules of Civil
13 Procedure, including but not limited to Rules 26, 28, 30, 31 and 32.” [See
14 Appendix A at 2, line 24 to 3, line 2 (renumbered as Rule 45.1(d))]. Among other
15 things, such a provision would make it clear to out-of-state lawyers that
16 depositions are subject to a four-hour limit (as provided in Rule 30(d)) and that
17 speaking objections are not permitted (as provided in Rule 32(d)(3)(D)).

18 **Subsection f: “Application to court.”** The State Bar has three concerns with
19 this subsection:

20 (1) Arizona’s civil discovery rules refer to requests for relief as
21 both “motions” and “applications.” Compare Ariz. R. Civ. P. 37(a)(1)
22 (“application” for order to enforce) with Ariz. R. Civ. P. 45(e) (“motion” to quash).
23 As such, the State Bar suggests adding the phrase “motion or” preceding references
24 in the subsection to “application.” [See Appendix A at 3, lines 3, 7, and 9-10
25 (renumbered as Rule 45.1(e))].

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1 (2) The State Bar also suggests replacing the words “submitted to”
2 with the words “filed with” to make it clear that a motion or application for relief
3 must be “filed.” [See Appendix A at 3, lines 5-6 (renumbered as Rule 45.1(e))].

4 (3) The proposed rule does not provide clear direction on how such
5 a motion or application may be presented to a court. In contrast to Rule 30(h),
6 obtaining a subpoena under proposed Rule 45.1 would not require an action to be
7 filed in Arizona; and, as such, no Arizona action would be pending in which to file
8 an application or motion for relief. In federal court, a party wishing to file a
9 motion to enforce or quash a subpoena relating to an out-of-district civil action
10 must file its motion in the issuing district as a miscellaneous civil action. Doing so
11 gives the matter a civil case number that is used to open a docket, assign a judge,
12 and facilitate case management. The State Bar suggests using a similar procedure
13 here by adding a requirement to the subsection that “[a]ny such motion or
14 application must be filed as a separate civil action bearing the caption that appears
15 on the subpoena.” [See Appendix A at 3, lines 6-8 (renumbered as Rule 45.1(e))].
16 To make it easy for the clerks’ offices to readily identify a filing’s purpose, the
17 State Bar also proposes that the subsection provide that “[t]he following phrase
18 must appear below the case number of the newly filed action: ‘Motion or
19 Application Related to a Subpoena Issued Under Ariz. R. Civ. P. 45.1.’” [See *id.*
20 at 3, lines 8-10]. Lastly, to clarify that any later disputes over the same subpoena
21 should be resolved in that same action, the State Bar proposes that the subsection
22 direct that “[a]ny later motion or application relating to the same subpoena must be
23 filed in the same action.” [See *id.* at 3, lines 10-11].

24 ***Subsection g: “Uniformity of application and construction.”*** The State Bar
25 recommends deleting this subsection because none of the other rules in the Arizona
26 Rules of Civil Procedure contains an interpretative guideline like the one proposed

1 in this subsection. [See Appendix A at 3, lines 12-14 (deleting subsection)].
2 Rather than include the guideline in the rule, the State Bar suggests including it in
3 a comment. [See *id.* at 3, lines 19-23]. The State Bar also suggests changing the
4 phrase as to the consideration to be given from “must” to “should.” [See *id.* at 3,
5 line 22]. In some cases, there may be countervailing Arizona interests that merit
6 consideration equal to the interest in preserving uniformity; and there should not be
7 any suggestion in the comment that a perceived need for “uniformity” always
8 trumps those Arizona considerations.

9 ***Subsection h: “Application to pending actions.”*** This subsection is
10 unnecessary and should be deleted. [See Appendix A at 3, lines 15-16 (deleting
11 subsection)]. Under Rule 81 of the Arizona Rules of Civil Procedure, a rule is
12 applied to pending matters on its effective date unless it “would not be feasible” to
13 do so or would “work [an] injustice.” Ariz. R. Civ. P. 81 (amendment applies to
14 actions pending on effective date unless “in the opinion of the court” its application
15 “would not be feasible or would work injustice”).

16 ***Subsection i: “Effective date.”*** This subsection is unnecessary and should
17 be deleted. [See Appendix A at 3, line 17 (deleting subsection)]. This Court
18 typically provides an effective date in the order adopting a new rule amendment,
19 and there is no reason to depart from that procedure here.

20 **III. If Proposed New Rule 45.1 is Adopted, Rule 45(b)(1) Would Need**
21 **to be Amended and Rule 30(h) Would Need to be Abrogated.**

22 Apart from the changes to proposed new Rule 45.1 suggested above, the
23 State Bar also proposes a small modification to petitioners’ proposed amendment
24 to Rule 45(b)(1) of the Arizona Rules of Civil Procedure. The State Bar agrees
25 that if Rule 45.1 is adopted, Rule 45(b)(1) should be modified. Under
26 Rule 45(b)(1), a deposition subpoena must be issued out of the court where the

1 action is pending. That procedure would not work in terms of a subpoena for
2 discovery for use in an out-of-state action, since the action is not pending in an
3 Arizona court. In its place, proposed Rule 45.1(c)(1) (like existing Rule 30(h))
4 provides that the subpoena must be issued out of the county in which the discovery
5 will be conducted. [See Appendix A, at 1, lines 23-25 (renumbered as Rule
6 45.1(b)(1))]. To effectuate that purpose, Rule 45(b)(1) should include an exception
7 for deposition subpoenas and directing the reader to Rule 45.1 if it applies. The
8 petitioners' proposed modification of Rule 45(b)(1) erroneously includes the
9 qualification "Except as otherwise provided in Rule 45.1," with the wrong sentence
10 in Rule 45(b)(1)—as proposed, it modifies the first sentence, which deals with
11 hearing and trial subpoenas, rather than the second sentence, which deals with
12 deposition subpoenas. Appendix B sets forth language to correct this oversight.
13 [See Appendix B].

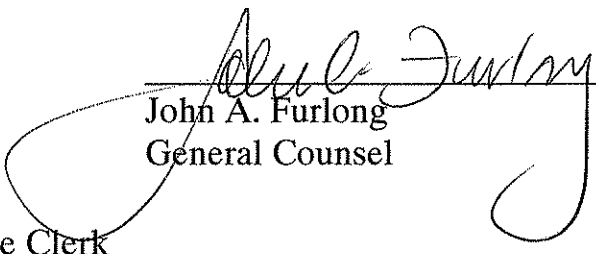
14 Finally, if the Court adopts the procedure embodied in proposed new
15 Rule 45.1, it should abrogate existing Rule 30(h) of the Arizona Rules of Civil
16 Procedure, as is shown in Appendix C.

17 Conclusion

18 The State Bar of Arizona respectfully requests that the Court: (a) adopt
19 proposed new Rule 45.1 (as modified in Appendix A); (b) amend Rule 45(b)(1) (as
20 modified in Appendix B); and (c) abrogate Rule 30(h) (as shown in Appendix C).
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RESPECTFULLY SUBMITTED this 18th day of May, 2012.



John A. Furlong
General Counsel

Electronic copy filed with the Clerk
of the Supreme Court of Arizona this
18th day of May, 2012,

by: Kathleen A. Lundgren

APPENDIX A

1 **Rule 45.1. Interstate Depositions and Discovery**

2 ~~(a) **Short Title.** This Rule may be cited as the Uniform Interstate Depositions~~
3 ~~and Discovery Rule.~~

4 **(a**b**) Definitions.** In this Rule:

5 (1) Foreign jurisdiction means a state other than this state.

6 (2) Foreign subpoena means a subpoena issued under authority of a court of
7 record of a foreign jurisdiction.

8 (3) Person means an individual, corporation, business trust, estate, trust,
9 partnership, limited liability company, association, joint venture, public corporation,
10 government, or governmental subdivision, agency or instrumentality, or any other legal or
11 commercial entity.

12 (4) State means a state of the United States, the District of Columbia, Puerto
13 Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory
14 or insular possession subject to the jurisdiction of the United States.

15 (5) Subpoena means a document, however denominated, issued under authority
16 of a court of record requiring a person to:

17 ~~(A*i*)~~ attend and give testimony at a deposition;

18 ~~(B*ii*)~~ produce and permit inspection and copying of designated books,
19 documents, records, electronically stored information, or tangible things in the possession,
20 custody, or control of the person; or

21 ~~(C*iii*)~~ permit inspection of premises under the control of the person.

22 **(be) Issuance of Subpoena.**

23 (1) To request issuance of a subpoena under this Rule ~~section~~, a party must
24 present ~~submit~~ a foreign subpoena to a clerk of court in the county in which discovery is
25 sought to be conducted in this state. The foreign subpoena must include the following
26 phrase below the case number: "For the Issuance of an Arizona Subpoena Under Ariz. R.

1 Civ. P. 45.1.” A request for the issuance of a subpoena under this Rule aet does not
2 constitute an appearance in the courts of this state.

3 (2) When a party presents ~~submits~~ a foreign subpoena to a clerk of court in this
4 state, the clerk, ~~in accordance with that court’s procedure,~~ shall promptly issue a signed but
5 otherwise blank subpoena to the party requesting it, and that party shall complete the
6 subpoena before service ~~subpoena for service upon the person to which the foreign~~
7 ~~subpoena is directed.~~

8 (3) A subpoena under subsection ~~(be)~~(2) must:

9 (A) state the name of the Arizona court issuing it;

10 (B) bear the caption and case number of the out-of-state case to which it
11 relates, identifying (before the case number) the foreign jurisdiction and court where the
12 case is pending;

13 (CA) accurately incorporate the discovery requested terms ~~used in the~~
14 ~~foreign subpoena; and~~

15 (DB) contain or be accompanied by the names, addresses, and telephone
16 numbers of all counsel of record in the proceeding to which the subpoena relates and of
17 any party not represented by counsel;:

18 (E) comply with the form specified in Rule 45(a)(1) and otherwise
19 required in Rule 45; and

20 (F) not request discovery exceeding the discovery authorized in Rule 45.

21 ~~(cd)~~ **Service of Ssubpoena.** A subpoena issued by a clerk of court under
22 subsection ~~(be)~~ of this Rule must be served in compliance with Rule 45~~(d)~~.

23 ~~(de)~~ **Deposition, Production, and Inspection.** Rule 45 applies to subpoenas
24 issued under subsection ~~(be)~~ of this Rule. Depositions and other discovery taken pursuant
25 to this Rule shall be conducted consistent with, and subject to the limitations in, the
26

1 Arizona Rules of Civil Procedure, including but not limited to Rules 26, 28, 30, 31 and
2 32.

3 **(ef) Motion or Application to a Ceourt.** An motion or application to the court
4 for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court
5 under subsection (be) must comply with the rules or statutes of this state and be filed with
6 submitted to the court in the county in which discovery is to be conducted. Any such
7 motion or application must be filed as a separate civil action bearing the caption that
8 appears on the subpoena. The following phrase must appear below the case number of the
9 newly filed action: “Motion or Application Related to a Subpoena Issued Under Ariz. R.
10 Civ. P. 45.1.” Any later motion or application relating to the same subpoena must be filed
11 in the same action.

12 ~~**(g) — Uniformity of application and construction.** In applying and construing~~
13 ~~this Rule, consideration must be given to the need to promote uniformity of the law with~~
14 ~~respect to its subject matter among states that enact it.~~

15 ~~**(h) — Application to pending actions.** This Rule applies to requests for discovery~~
16 ~~in cases pending on [the effective date of this subsection].~~

17 ~~**(i) — Effective date.** This Rule takes effect _____.~~

18

19 **2012 State Bar Committee Note**

20 This rule derives from the Uniform Interstate Depositions and Discovery Act, 13 Pt.
21 2 Uniform Laws Annotated 59 (West 2011 Supp.). In applying and construing this Rule,
22 consideration should be given to the need to promote uniformity of the law with respect to
23 its subject matter among states that adopt or enact it.

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APPENDIX B

The State Bar's Proposed Alternative to Petitioners' Proposed Amendment to Rule 45(b)(1) (petitioners' proposed amendment shown in brackets; proposed State Bar additions are shown by underscoring and deletions are shown by "strike-through")

Rule 45. Subpoena

**(b) For Attendance of Witnesses at Hearing, Trial or Deposition;
Objections**

(1) *Issuing Court.* [~~Except as otherwise provided in Rule 45.1, a~~] A subpoena commanding a person to attend and give testimony at a hearing or trial shall issue from the superior court for the county in which the hearing or trial is to be held. Except as otherwise provided in Rule 45.1, a A subpoena commanding a person to attend and give testimony at a deposition shall issue from the superior court for the county in which the case is pending.

* * * *

APPENDIX C

Rule 30(h). Depositions for foreign jurisdiction

~~When an action is pending in a jurisdiction foreign to the State of Arizona and a party or a party's attorney wishes to take a deposition in this state, it may be done and a subpoena or subpoena duces tecum may issue therefor from the Superior Court of this state. The party or attorney shall file, as a civil action, an application, under oath, captioned as is the foreign action, which contains the following information:~~

~~(a) — The caption of the case and the court in which it is pending including the names of all parties and the names of the attorneys for the parties;~~

~~(b) — References to the law of the jurisdiction in which the action is pending which authorized the taking of the deposition in this state and such facts as, under that law, must appear to entitle the party to take the deposition and have a subpoena issued for the attendance of the witness;~~

~~(c) — A certified copy of the notice of taking deposition, order of the court authorizing the deposition, commission or letters rogatory or such other pleadings as, under the law of the foreign jurisdiction, are necessary in order to take the deposition;~~

~~(d) — A description of the notice given to other parties and a description of the service of the application to be made upon other parties to the action.~~

~~Upon the filing of the application, the clerk of the Superior Court of the county in which the deposition is to be taken shall forthwith issue the subpoena or subpoena duces tecum as requested by the application. An affidavit of service of the application upon all other parties to the civil action shall be filed with the clerk of the court.~~

~~No further proceedings in the Superior Court of the State of Arizona are required but any party or the witness may make such motions as are appropriate under the Arizona Rules of Civil Procedure.~~