

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CAL. 94102
415-522-4093

BERNARD ZIMMERMAN
UNITED STATES MAGISTRATE JUDGE

September 14, 2011

Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Secretary:

At the invitation of the Civil Rules Advisory Committee, I am writing to comment on the proposed standard for transfer of a subpoena related motion under proposed Rule 45(f).

I have been a United States Magistrate Judge for 16 years sitting in the Northern District of California. I have regularly been asked to enforce subpoenas issued in this district in connection with litigation pending in other districts. On a number of occasions I have transferred the enforcement proceeding to the issuing court, generally with the consent of the parties. In each instance, I raised the issue sua sponte. I do not know if any of my orders were published.

As I understand the proposed Rule 45, subpoenas will be issued in the litigation district but may require compliance in some other district. Proposed Rule 45(f) would permit the compliance district to transfer a motion to enforce a subpoena under Rule 45(d)(2)(B)(i) to the litigation or issuing district upon a showing of "exceptional circumstances." Based on my experience, transfer is a valuable tool for a judge faced with such an enforcement proceeding and I am concerned that the requirement for "exceptional circumstances" may not provide the enforcement judge with enough flexibility.

My experience has been that objections to such subpoenas fall into two broad categories. One category is objections which

come principally from the witness, who will now be in the compliance district, and generally have to do with logistical matters such as the burden being placed on the witness or the witness' desire to protect private or confidential information. In my judgment, these issues will be best handled in the compliance district since generally it would be inconvenient and expensive for the witness to retain counsel to assert its rights in the litigation district.

Another category is objections which come not from the witness but from one of the parties to this litigation. One common objection is lack of relevance. Another is that the subpoena is inconsistent with, or even violates, an order issued by the litigation court. Often they are supported by an assertion by the witness that producing such documents constitutes an undue burden. In my judgment, such objections should be, for the most part, transferred to the litigation court. While it is true that the compliance court can make its own determination of what is relevant or whether the subpoena violates the litigation court's rulings, those determinations can more expeditiously be made by the litigation court. And the possibility of inconsistent rulings would be eliminated. In fact, I would expect there would be more carefully drawn subpoenas and fewer such objections if the parties knew that the dispute might be transferred to the litigating court.

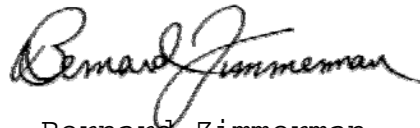
Typically, I have contacted the litigation judge and asked whether that judge has any objection to my transferring. Invariably the response was no. Sometimes, the judge was actually desirous of the transfer and suggested that forum shopping might be involved.

Since in my experience appropriate enforcement motions should be regularly transferred to the litigation district, I believe that a good cause standard would work better than an "exceptional circumstances" standard.

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Ltr. to Secretary Rules Committee

Thank you for your consideration. Please advise if you wish anything further.

Yours very truly,

A handwritten signature in cursive script that reads "Bernard Zimmerman". The signature is written in black ink and is positioned above the printed name.

Bernard Zimmerman