



**THE STATE BAR
OF CALIFORNIA**
– COMMITTEE ON FEDERAL COURTS

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February 15, 2012

11-CV-019

Via E-mail

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

Re: Proposed Amendments to Federal Rule of Civil Procedure 45

Dear Mr. McCabe:

The State Bar of California's Committee on Federal Courts offers the following comments on the proposed amendments to Federal Rule of Civil Procedure 45.

Proposed Rule 45(f) permits a district court to transfer subpoena-related motions from the compliance court to the issuing court if the court finds "exceptional circumstances." We agree with the Committee Note's conclusion that a "precise definition of 'exceptional circumstances' authorizing transfer is not feasible." However, we believe that this standard would benefit from further elucidation beyond the factors already identified. In particular, we believe a nonparty's close relationship with a party to the underlying case should be identified in the Committee Note as a factor supporting transfer. For example, if the nonparty is a consultant or employee of a party, this relationship should favor transfer. In contrast, the absence of a relationship between the nonparty and any party should weigh against transfer. We believe adding this additional commentary to the Committee Note would encourage courts to make practical assessments about the relationship between the nonparty and the parties to the case when deciding transfer motions.

In addition to the comment above, we wish to note a potential issue related to one of the proposed changes. Proposed Rule 45(f) provides that if a nonparty's attorney is authorized to practice in the compliance court, that attorney "may file papers and appear on the motion as an officer of the issuing court" upon transfer of the subpoena-related motion. The proposed rule does not, however, contain a provision permitting a party's attorney, admitted to practice in the issuing court, to appear in the compliance court for purposes of a subpoena-related motion. The Committee on Federal Courts took no position on this issue, and recognizes that it would raise new and different questions, but believes it may warrant further study.

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Thank you for your consideration of our comments.

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Very truly yours,

Kelly A. Woodruff
Chair, 2011-2012
The State Bar of California
Committee on Federal Courts