

THE JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT  
219 South Dearborn Street  
Chicago, Illinois 60604

January 15, 2009

FRANK H. EASTERBROOK  
Chief Judge

No. 07-08-90106

IN RE COMPLAINT AGAINST A JUDICIAL OFFICER

MEMORANDUM

Complainant is representing himself in pending civil litigation. He contends that the judge committed misconduct by directing the clerk of court to disregard Fed. R. Civ. P. 45(a)(3), which provides that the clerk will issue blank subpoenas to litigants on request. According to complainant, the clerk refused to issue subpoenas pending consultation with the judge, who then instructed the clerk not to provide the requested forms.

The judge's action in directing the clerk not to provide complainant with the blank subpoenas he sought is within the scope of 28 U.S.C. §352(b)(1)(A)(ii), which provides that any complaint that is "directly related to the merits of a decision or procedural ruling" must be dismissed. The judge's decision was a "procedural ruling" and thus outside the scope of the Judicial Conduct and Disability Act of 1980. "Any allegation that calls into question the correctness of an official action of a judge ... is merits related." Standard 2 for Assessing Compliance with the Act, *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* 145 (2006). The subject judge believes that complainant (who is under indictment for fraud) has misused subpoenas in the past, and that his conduct of litigation therefore requires close supervision.

Any standing order to the clerk, however, is not covered by §352(b)(1)(A)(ii), because it is not a case-specific decision. A standing order to depart from the terms of a national rule of procedure would be problematic. See Fed. R. Civ. P. 83; *United States v. Zingsheim*, 384 F.3d 867, 870 (7th Cir. 2004); *In re Dorner*, 343 F.3d 910 (7th Cir. 2003). I therefore asked the district judge for a response to the complaint. He stated that he had not issued such a standing order and that the clerk consulted him about complainant's request in an exercise of her own discretion. More recently, the judge has instructed the clerk to issue blank subpoenas on request, without consulting the judge, and that this has been done for one of complainant's recent requests in particular. The complaint is therefore dismissed under 28 U.S.C. §352(b)(2), because effective corrective action has been implemented.

The circumstances of this complaint, and the potential for abuse of subpoenas by *pro se* litigants, may well lead the Standing Committee on Rules of Practice and Procedure to review and revise Rule 45(a)(3). Moreover, district courts may have some flexibility to implement local rules that require consultation between the clerk and the judge when a particular request for blank subpoenas appears to presage abuse of those subpoenas. A complaint under the 1980 Act, however, is not an appropriate means to address these issues. Quite independent of §352(b)(2), a judge's decision to take one view rather than another of a national rule's scope cannot be called "conduct prejudicial to the effective and expeditious administration of the business of the courts" (28 U.S.C. §351(a)). No misconduct has been committed.