FEDERAL MAGISTRATE JUDGES ASSOCIATION

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January 23, 2004

Peter McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Comments on Proposed Amendments to Federal Rules
Civil and Criminal Procedure

Dear Mr. McCabe:

The Federal Magistrate Judges Association (FMJA) submits the following comments to the Rules Advisory Committee. The comments were first considered by the Standing Rules Committee of the FMJA chaired by the Honorable Barry M. Kurren. The committee members are:

Honorable S. Allan Alexander, Northern District - Mississippi
Honorable Hugh W. Brennenman Jr., Western District - Michigan
Honorable Joe B. Brown, Middle District - Tennessee
Honorable B. Waugh Crigler, Western District - Virginia
Honorable Morton Denlow, Northern District - Illinois
Honorable Patricia A. Hemann, Northern District - Ohio
Honorable Paul Komives, Eastern District - Michigan
Honorable Malachy E. Mannion, Middle District - Pennsylvania
Honorable Michael Merz, Southern District - Ohio
Honorable Mary Pat Thynge, District of Deleware
Honorable Andrew Wistrich, Central District - California

The committee members come from several kinds of districts and have varying types of duties. Many of them consulted with their colleagues in the course of preparing these comments. The comments were then reviewed and, unanimously approved by the Officers and Directors of the FMJA.

The comments reflect the considered position of magistrate judges as a whole. The FMJA has also encouraged individual magistrate judges to forward comments to you. We are pleased to have this opportunity to present written comments representing the view of the FMJA and we welcome the opportunity to testify.

Sincerely yours,

Louisa Porter

Louisa S Porter
United States Magistrate Judge
President, Federal Magistrate Judges Association

COMMENTS OF FEDERAL MAGISTRATE JUDGES ASSOCIATION RULES COMMITTEE ON PROPOSED CHANGES TO THE FEDERAL RULES OF CIVIL PROCEDURE AND CRIMINAL PROCEDURE (Class of 2005)

I. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

(A) PROPOSED RULE 5.1 (CONSTITUTIONAL CHALLENGE TO STATUTE NOTICE AND CERTIFICATION)

COMMENT: The FMJA Rules Committee supports the proposed addition of Rule 5.1, which would replace the last three sentences of Rule 24(c) in setting out the duty to notify the U.S. Attorney General or appropriate State Attorney General when motion or other paper challenges the Federal or State constitutionality of a statute.

DISCUSSION: The Committee is in agreement that the movement of the provisions related to notification out of the last three sentences of Rule 24(c) into its own rule is more likely to focus attorney attention on these important matters. Additionally, the Committee supports Rule 5.1 placing the burden of notification on the party that files the "pleading, written motion or other paper" bringing into question the constitutionality of a statute. Finally, the Committee believes that this new rule appropriately addresses its interface with the certification requirement of 28 U.S.C. § 2403 and logically establishes a "not less than 60 days from the Rule 5.1(b) certification for intervention by the Attorney General or State Attorney General" which comports with the federal government's normal time to respond to an action pursuant to Rule 12(a)(3).

(B) PROPOSED AMENDMENT TO RULE 6 (TIME)

COMMENT: The FMJA Rules Committee supports the proposed change to Rule 6 by clarifying the method of counting the three additional days provided to respond if service is by mail or one of the methods prescribed in Rules 5(b)(2)(C) or (D). Under this amendment, these additional days would be added after the prescribed period expires.

DISCUSSION: Although the Committee has no opposition to the proposed change to Rule 6, it would note that the amendment does not solve underlying problems associated with computations of time under Rule 6 which, in its current or proposed amended form, represents

a rather complex set of calculations not tied to any definite time frame, such as a calendar week (7 days). Computations under the rule border on being labyrinthian and require "finger counting," a very fallible method. The Magistrate Judges would join in the Advisory Committee's "anguish" over time calculations under Rule 6. *See May 21, 2003 Report of Civil Rules Advisory Committee.* It recommends that the Standing Committee and the Advisory Committee revisit Rule 6 in its entirety with an eye toward promulgating a rule based on "running time" tied to a calendar week or multiples thereof. Should a period expire on a holiday or weekend, of course, the time could be extended to the next business day. The Magistrate Judges are aware of several extant state rules tracking the calendar method, and recommend they be consulted as illustrations.

(C) PROPOSED AMENDMENT TO RULE 27 (DEPOSITIONS BEFORE ACTION OR PENDING APPEAL)

COMMENT: The FMJA Rules Committee supports this amendment which corrects the outdated reference to former Rule 4(d) and makes clear that all methods of service authorized under Rule 4 can be used to serve or petition to perpetuate testimony.

DISCUSSION: Current Rule 27(a)(2) is not only stylistically awkward, but it is also outdated by its reference to Rule 4(d) as the means of service of a notice which is permitted upon the filing of a verified petition to perpetuate testimony before an action is filed. The proposed amendment breaks down the present three "daisy chain"style sentences into five sentences specifically identifying each separate requirement of the rule. The result is much greater clarity. The amended format facilitates understanding.

The amendment is necessary because Rule 4(d), as amended in 1993, now contains only provisions regulating waiver of service. The amended rule expands permitted means of service of notice of the petition to include all methods of service now permitted by Rule 4 in its entirety, and, in the process, assures that a person filing such a petition is given the means by which to accomplish service upon a person in a foreign country and upon a foreign state or political subdivision.

(D) PROPOSED AMENDMENT TO RULE 45 (SUBPOENA)

COMMENT: The FMJA Rules Committee supports the proposed amendment to Rule 45(a)(1) which adds a requirement that notice be given to a non-party deponent as to how the testimony will be recorded so that the non-party deponent may be able to raise any objections to the deposition in a timely manner.

DISCUSSION: The amendment sets forth more clearly the required procedure for the issuance of, and the required substance of, a deposition subpoena. Primarily, the amendment entitles a subpoenaed witness to be notified of the manner of recording of deposition testimony, thus putting subpoenaed witnesses on equal grounds with witnesses deposed pursuant to Rule 30(b)(2). Advance notice of the recording method affords both party and non-party deponents an opportunity to raise any objections to the manner of recording.

II. PROPOSED AMENDMENTS TO ADMIRALTY RULES B & C

COMMENT: The FMJA Rules Committee supports the proposed amendments to Admiralty Rules B and C. The amendment to Rule B would add a phrase to specify that the time for determining whether a defendant is "found" in the district in whose court suit is commenced would be the time when the complaint is filed. The amendment to Rule C is technical and simply corrects an oversight which occurred when this rule was amended in 2000.

DISCUSSION: **Rule B.** This rule governs in personam admiralty actions. It specifies when attachment and garnishment may be available to a plaintiff at the outset of the case. Subsection (1)(a) currently states that if a defendant is not found within the district, a verified complaint may contain a prayer for process to attach a defendant's tangible or intangible personal property which may be in the hands of garnishees who are named in the process being issued. In *Heidmar, Inc. V. Anomina Ravennate di Armamento Sp.A of Ravenna*, 132 F.3d 264 (5th Cir. 1998), an out-of-state owner of a vessel which had been attached at the request of the plaintiff when suit was filed moved to vacate the attachment because, fifteen minutes after the complaint was filed, the owner appointed an agent for service of process. The Fifth Circuit posed the issue presented as one of timing: in order to be found within the district for purposes of Rule B, must the defendant be present at the time the complaint is filed, or may the defendant appear some time

thereafter? The court ruled that the time of filing was dispositive and rejected the owner's contention that appointing an agent to accept service of process after the filing of the complaint defeated the attachment under the language of the rule. The First Circuit reached a similar conclusion in *Navieros Inter-Americanos, S.A. v. M/V Vasilia Express*, 120 F.3d 304, 314-315 (1st Cir. 1997). The proposed amendment adds the phrase "when a verified complaint praying for attachment and the affidavit required by Rule (B)(1)(b) are filed[.]" This amendment simply codifies the holdings of the Fifth and First Circuits in the above cases.

Rule C. This rule governs in rem actions. Subsection 6 deals with responsive pleading; subpart (b) of this subsection deals with maritime arrests and other proceedings. The rule requires persons who assert a right of possession or any ownership interest in the property that is the subject of the action to file a verified statement of right or interest within a specified time. As presently worded, that time is "within 10 days after the earlier of (1) the execution of process, or (2) completed publication of notice under Rule C(4)[.]" The amended rule deletes the language of subpart (2), "completed publication of notice under Rule C(4)" because Rule C(4) requires publication of notice only if the property that is the subject of the action is not released within 10 days after execution of process. The advisory committee which proposed this deletion pointed out that execution of process will always be earlier than publication. Thus, the committee recommended that the rule be amended to read "within 10 days after the execution of process[.]" This is a technical correction. It should be adopted.

III. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

A. PROPOSED AMENDMENTS TO RULE 12.2 (NOTICE OF AN INSANITY DEFENSE; MENTAL EXAMINATION)

COMMENT: The FMJA Rules Committee supports the amendment to Rule 12.2 which authorizes a court to exclude evidence on the issue of the defendant's mental disease, mental defect or any other mental condition if the evidence is not timely disclosed or if the defendant fails to submit to an examination.

DISCUSSION: The revision of Rule 12.2 (d)(1) is an appropriate stylistic change. New Rule 12.2(d)(2) provides a new authority to sanction failure to disclose expert evidence for failure to comply with the new

disclosure requirements in Rule 12.2(c)(3), but appropriately entrusts to the court to fashion an appropriate sanction.

B. PROPOSED AMENDMENT TO RULE 32 (SENTENCING AND JUDGMENT)

COMMENT: The Committee supports the proposed amendment.

DISCUSSION: Rule 32 contains a right of allocution for victims of a crime of violence or sexual abuse. The proposed amendment expands the right of allocution by extending it to include victims of all felonies. Although extending the right of allocution to victims of felony offenses not involving violence or sexual abuse makes sense, it raises two concerns.

First, the proposed amendment does not explicitly authorize the court to determine who is, and who is not, a victim. Insofar as crimes of violence or sexual abuse are concerned, this is not a problem because the existence and identity of a specific victim or victims usually is clear. When the right of victim allocution is extended to all felonies, however, the rule encompasses numerous offenses as to which the existence or the identity of a specific victim is not clear. Who is the victim of a conspiracy to distribute controlled substances, an unauthorized re-entry after deportation, or structuring to evade financial transaction reporting requirements? Is there no victim, or is everyone a victim? If members of the public appear at sentencing and ask for permission to address the court regarding the consequences of such offenses, must the court allow them to do so? Similarly, the class of those arguably victimized by some felonies, such as securities laws violations which cause a corporate insolvency, may be very broad. Are there limits on which arguable victims are so remote that the court need not allow them to be heard? The proposed amendment does not address these issues.

Second, the proposed amendment may unduly restrict the discretion of the court to determine the manner in which a victim may present information to the court. By providing that the court "must address" victims present during the sentencing hearing, and "must permit the victim to speak or submit any information about the sentence", the proposed amendment to the rule arguably requires the court to take information orally rather than in writing, if the victim so requests, and to accept any information that a victim desires to present. This may be awkward and unduly time-

consuming at least in some cases. This issue is partly addressed in the Advisory Committee Note, which states that "[i]n a particular case, the court may permit, or require some or all of the victims to present their information in the form of written statements." That statement, however, seems inconsistent with the language used in the proposed amendment itself, and may cause confusion.

Perhaps the best way to address both of these issues would be to add the following sentence to the rule: "In particular cases, the court may, in its discretion, determine who are the victims of an offense, impose reasonable limits on the number of victims or classes of victims who may present information, and determine whether the information presented should be presented orally, in writing, or by some other means." This seems preferable to other possibilities, such as attempting to carve some classes of felonies out of the proposed amendment.

C. PROPOSED AMENDMENT TO RULE 32.1 (REVOKING OR MODIFYING PROBATION OR SUPERVISED RELEASE)

COMMENT: The Committee supports the proposed amendment.

DISCUSSION: The proposed amendment provides a defendant with a right of allocution before probation or supervised release is revoked, or before conditions of probation or supervised release are modified. It wisely fills a gap in the rule noted in case law.

D. PROPOSED AMENDMENTS TO RULE 29 (MOTION FOR JUDGMENT OF ACQUITTAL), RULE 33 (NEW TRIAL), RULE 34 (ARRESTING JUDGMENT), AND RULE 45 (COMPUTING AND EXTENDING TIME)

COMMENT: The FMJA Rules Committee supports the proposed amendments to Rule 29 (Motion for a Judgment of Acquittal), Rule 33 (New Trial) and Rule 34 (Arresting Judgment), which would permit a court to extend the time for filing the designated motion, even if the court rules on the matter after the expiration of the specified seven (7) days, provided that the defendant's motion for an extension was filed within the 7-day period. The Committee further supports the amendment to Rule 45

(Computing and Extending Time) to conform this rule to the proposed amendments to Rules 29, 33 and 34.

DISCUSSION: Presently, Rules 29, 33 and 34 each have a 7-day period for a defendant to bring a motion for the relief indicated. Courts have held the 7-day rule is jurisdictional. Thus, if a defendant moves for an extension of time to file a motion for relief under one of these rules, the court must rule on the motion within the same seven day period or lose jurisdiction to act. The proposed amendments to these rules simply provide that the court is not forced to rule on a motion to extend time within a particular time period or face the loss of jurisdiction to do so.

Rule 45(b)(2) similarly limits a court's ability to extend the time for taking action under Rules 29, 33 or 34. The proposed amendment to Rule 45 simply conforms it to the other three amended rules.

In summary, the defendant is still required to file motions under Rules 29, 33 and 34 within the respective 7-day periods set forth in those rules. However, under the proposed amendments, if within that 7-day period the defendant files a motion to extend time to file one of these motions, the court is not required to act on the motion for an extension of time within a particular time period. And if the defendant fails to file one of the underlying motions within the specified time provided by the particular rule, the court may under the amended Rule 45 consider the untimely motion if it determines the failure to file the untimely motion was the result of excusable neglect. Rule 45(b)(1).

E. PROPOSED RULE 59 (MATTERS BEFORE A MAGISTRATE JUDGE)

COMMENT: The Committee supports the adoption of a new rule that is analogous to Rule 72 of the Federal Rules of Civil Procedure and creates a procedure for district judges to review nondispositive and dispositive decisions by magistrate judges in criminal cases. The Committee recommends that the language of the proposed rule be modified to prevent confusion, to promote finality of decisions, to maintain consistency with Rule 72, and to

clarify the legal effect of a report and recommendation on a dispositive matter.

DISCUSSION: The proposed rule is derived in part from Federal Rule of Civil Procedure 72, but contains important differences that may create confusion. Because both Rules 59(a) and 72(a) apply to "nondispositive matters," the meaning of the term "nondispositive matter" should be the same in both rules. It is not. Rule 59(a) applies to referrals from a district judge of "any matter that does not dispose of the case," whereas Rule 72(a) applies to referrals of "a pretrial matter not dispositive of a claim or defense of a party." For example, the dismissal of one count of a multi-count civil complaint would be treated as a dispositive ruling under Rule 72(a) because it disposes of a claim, but the dismissal of one count of a multi-count criminal indictment would not be treated as a dispositive ruling under proposed Rule 59(a) because it does not dispose of the case. There is no explanation in the Advisory Committee Notes for this difference between Rule 59(a) and Rule 72(a). The issue of whether a matter is dispositive or nondispositive has important consequences for how courts and parties must address the matter. Therefore, in order to avoid confusion, the definitions should be equivalent for both civil and criminal cases. In the Federal Rules of Criminal Procedure the term "charge" is equivalent to the term "claim" in the civil rules. See e.g., Fed. R. Civ. P. 10(a)(2) (". . . stating to the defendant the substance of the charge"); Fed. R. Cr. P. 11(b)(1)(6) ("the nature of each charge to which the defendant is pleading"). For these reasons, the use of the phrase "matter not dispositive of a charge or defense of a party" similar to Rule 72(a) is preferable.

Rule 59(b)(1) addresses dispositive matters. Rule 59(b)(1) includes a "defendant's motion to dismiss or quash an indictment or information, or a motion to suppress evidence" as examples of dispositive matters. Once again, the definition of a dispositive matter as "any matter that may dispose of the case" creates an ambiguity for those situations where a motion to dismiss or a motion to suppress evidence is directed to only a portion of the case. Are these motions to be considered dispositive under Rule 59(b) or non-dispositive under Rule 59(a)? For this reason, the use of the phrase "matter dispositive of a charge or

defense of a party" that parallels Rule 72(b) is preferable, because it recognizes that dismissal of a portion of an indictment is dispositive of a charge although it may not dispose of the case. Therefore, to identify issues as dispositive when they may not dispose of the case creates confusion under Rule 59(b) that does not arise under Rule 72(b). Because orders entered under Rule 59(a) are self-executing if not objected to, whereas reports and recommendations under Rule 59(b) are not self-executing, the Rule should be clarified to differentiate between dispositive and non-dispositive criminal matters consistent with the treatment of dispositive and non-dispositive civil matters under Rule 72. Furthermore, the Committee supports the specific identification of a motion to suppress evidence as a dispositive matter based on existing practice.

A second issue raised by Rule 59(a) is the issue of the timing of filing objections. Rule 59(a) provides that a party may file objections "within 10 days after being served with a copy of a written order or after the oral order is made on the record, or at some other time the court sets." Rule 72(a) provides that objections may be filed "[w]ithin 10 days after being served with a copy of the magistrate judge's order." As proposed, Rule 59(a) creates the following ambiguity: If a court announces its ruling from the bench and later enters a written order on the docket, when does the 10 day objection period begin to run? It is not unusual for a judge to announce a ruling in court and later enter a written order on the same motion. The Rule or Advisory Committee Notes should be clarified to provide that the 10 days begin to run from the date the oral order is made on the record, but only when no written order is entered. In the event a written order is entered, the 10 days should begin to run after the party is served with a copy of the written order.

Third, Rules 59(a) and 59(b)(2) both state: "Failure to object in accordance with this rule waives a party's right to review." Rule 72 does not contain a comparable provision. The Committee recommends that similar provisions be added to Rule 72 in order to avoid the inference that a failure to object under Rule 72 does not waive a party's right to review.

A fourth issue raised by Rules 59(a) and 59(b) is that they permit the court to alter the time for filing objections. Rule 59(a) allows the time for objections to be altered to "such other time the court sets." Similar language is found in Rule 59(b)(2) ("or such other period as fixed by the court"). No similar provision exists in Rule 72(a). This provision in Rule 59 is problematic because it appears to defeat the purpose of the final sentences of Rule 59(a) and 59(b)(2) which both state: "Failure to object in accordance with this rule waives a party's right to review." Can a party ask the magistrate judge or district judge to extend the time for filing objections one month after the ruling is made? How about one year? The Rule appears to permit it. If so, there would appear to be no finality. The Committee recommends that the 10 day time period of Rule 72(a) be included in Rule 59 or, if an extension is requested, that the request for an extension be made to the court within the initial 10 day period. Allowing the time for objections to be extended to "such other time the court sets" is an invitation for delay and a lack of finality that should either be deleted or be strictly limited.

Fifth, Rule 59(a) permits a district judge to refer "any matter that does not dispose of the case," whereas Rule 72(a) governs referrals of "a pretrial matter not dispositive of a claim or defense of a party." The authority of magistrate judges to handle pretrial and post-trial referrals derives from 28 U.S.C. § 636(b)(1)(a) and 28 U.S.C. § 636(b)(3). It would be useful if the Advisory Committee Notes specifically discuss the reason for the difference in scope of the referrals and the reliance upon 28 U.S.C. § 636(b)(3) for this expanded scope. *Peretz v. United States*, 501 U.S. 923, 932 (1991) ("The generality of the category of 'additional duties' indicates that Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen"). The broad scope of Rule 59(a) may lead to a later modification of Rule 72(a) to specifically include the work performed by magistrate judges on post-trial matters.

Finally, Rule 59(b)(3) describes the procedure for *de novo* review by the district judge of any objections. However, there is no discussion of the effect of a report and

recommendation in the absence of an objection. See *Thomas v. Arn*, 474 U.S. 140, 154 (1985) ("Moreover, while the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard"). It would be helpful to add a new Rule 59(b)(4) that would make it clear that, even where no objection is filed, a report and recommendation is not self-executing and has no force or effect until the district judge enters an order or judgment with respect to the report and recommendation. *Matthews v. Weber*, 423 U.S. 261, 271 (1976)("The authority and the responsibility to make an informed, final determination, we emphasize, remains with the [district] judge").