FEDERAL MAGISTRATE JUDGES ASSOCIATION

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January 11, 2010

09-EV-011

Peter G. McCabe, Secretary
Committee on Rules of Practice & Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

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

Dear Mr. McCabe:

The Federal Magistrate Judges Association submits the attached comments to the Rules Advisory Committee. The comments were first considered by the Standing Rules Committee of the FMJA, chaired by Judge Alexander. The committee members are:

Honorable S. Allan Alexander, Northern District of Mississippi, Chair
Honorable Hugh Warren Brenneman, Jr., Western District of Michigan
Honorable Geraldine Soat Brown, Northern District of Illinois
Honorable Joe B. Brown, Middle District of Tennessee
Honorable William E. Callahan, Jr., Eastern District of Wisconsin
Honorable Waugh B. Crigler, Western District of Virginia
Honorable Virginia M. Morgan, Eastern District of Michigan
Honorable Mary Pat Thynge, Delaware District Court
Honorable David A. Sanders, Northern District of Mississippi
Honorable Nita L. Stormes, Eastern District of Pennsylvania
Honorable Diane K. Vescovo, Western District of Tennessee
Honorable Andrew J. Wistrich, Central District of 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 t his opportunity to present written comments representing the view of the FMJA, and we welcome the opportunity to testify.

Sincerely,

Thomas C. Mummert, III
President, FMJA

COMMENTS OF FEDERAL MAGISTRATE JUDGES ASSOCIATION ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE (Class of 2011)

I. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE:

A. PROPOSED RULE 1 – Scope; Definitions

COMMENT: The proposed amendment expands the definitions of "telephone" and "telephonic" to address changes in technology. **The Federal Magistrate Judges Association endorses the proposed change.**

B. PROPOSED RULE 3 – The Complaint

COMMENT: Rule 3 authorizes consideration of complaints and issuance of arrest warrants and search warrants based on information submitted by reliable electronic means as provided for in proposed Rule 4.1. **The FMJA endorses the proposed changes subject to its reservations and proposed revisions to proposed new Rule 4.1.**

C. PROPOSED RULE 4 – Arrest Warrant or Summons on a Complaint

COMMENT: The proposed changes to Rule 4 authorize the issuance of arrest warrants and summonses based on information submitted by reliable electronic means as provided for in proposed new Rule 4.1,

the return of warrants by reliable electronic means, and the use of a duplicate original warrant to be shown to the defendant. **The FMJA endorses the proposed changes subject to its reservations and proposed revisions to proposed new Rule 4.1.**

D. PROPOSED RULE 4.1

COMMENT: Proposed Rule 4.1 incorporates provisions of Rule 41 that allow a warrant to be issued based on information submitted by reliable electronic means and extends those procedures to complaints, arrest warrants and summonses. **The FMJA endorses the principle underlying proposed Rule 4.1 but believes that the purpose of the proposed rule could best be achieved by revision to more accurately reflect the function of a magistrate judge and clarify procedures calculated to assure protection of constitutional rights.**

DISCUSSION: Proposed new Fed. R. Crim. P. 4.1 is based on current Fed. R.Crim. P. 41(d)(3), which authorizes a magistrate judge to issue a search warrant based on information and application transmitted by "telephone or other reliable electronic means" rather than by the agent's personal presence before the judge. Proposed Rule 4.1 is intended to simplify the procedure now set out in Rule 41(d)(3) and to apply the procedure both to search warrants and arrest warrants under the proposed amendment to Rule 4(d).

Although FMJA endorses the principle of proposed Rule 4.1, it has the following reservations and proposes the following revisions.

Current Rule 41(d)(3) is cumbersome to use in the most common situation: when the information communicated

by electronic means which forms the basis of probable cause is limited to the agent's affidavit. Under the current rule, the judge's "conversation" with the agent and government attorney must be recorded by a recording device, a court reporter or in writing; the recording or the court reporter's notes must be transcribed; and the transcription or written record must be filed, even if the agent is only swearing to the contents of an affidavit that has been faxed or e-mailed to the judge. That is more than is generally done when the agent appears before the judge in person and swears to the contents of a affidavit; generally, that exchange is not recorded. Proposed Rule 4.1 is intended to simplify the process by allowing a judge to simply prepare and file an order or summary if the information upon which the warrant is issued is limited to the affidavit, instead of recording the entire conversation. The objective – to make a clear and permanent record of the basis for the judge's probable cause determination in case of a motion to suppress – is still achieved.

The problem with the proposed Rule 4.1 is not the intent, but the drafting.

First, subparts 4.1(a) and (b)7 refer to a magistrate judge "deciding whether to approve a complaint." That is not correct. The magistrate judge does not *approve* a complaint; the magistrate judge decides whether there is probable cause for the charges in the complaint. Thus, the FJMA suggests that those subparts be revised to read as follows:

(a) ***In General.*** A magistrate judge may consider information communicated by telephone or other reliable electronic means when deciding whether there is probable cause set forth in a complaint or

to issue a warrant or summons.

(b)(7) ***Signing***. If the judge decides that there is probable cause set forth in the complaint or to issue the warrant or summons, the judge must immediately: [etc]

The FMJA believes that this language would also assure the intent that the specified procedures apply whether the court is addressing pre-arrest situations or situations where the person has been taken into custody on a warrantless arrest.

Second, we found 4.1(b)(2) and (3) very confusing. For example, it is unclear whether the use of "verbatim recording" and "verbatim record" is intended to mean different things in subpart (b)(3).

In addition, current Rule 41(d)(3) has certain problems that are perpetuated rather than corrected in the proposed rule. Current Rule 41(d)(3) requires the judge to certify the accuracy of a transcription of any recording or court reporter's notes. Certification is the responsibility of the court reporter who prepares the transcript, not of the judge. Also, the FTR recording system used in many magistrate judge courtrooms is already certified, so there is no need for the judge to re-certify the accuracy of that recording. Similarly, the obligation to make arrangements for the recording of testimony should belong to the government attorney seeking the warrant, not the judge.

The FMJA suggests the following in lieu of proposed subparts (b)(2) and (3):

(b)(2). ***Recording and Certifying Testimony.*** If

the judge considers information in addition to the contents of a written affidavit submitted by reliable electronic means, the testimony must be recorded verbatim by an electronic recording device, a court reporter, or in writing. The judge must have any recording or court reporter's notes transcribed, have the transcription's accuracy certified, and file the transcript. The judge must sign any written record, certify its accuracy and file it.

(b)(3) ***Preparing a Summary or Order.*** If the testimony is limited to the affiant's attesting to the contents of a written affidavit submitted by reliable electronic means, the judge must simply prepare, sign and file a written summary or order.

In making these comments, the FMJA strongly endorses the recognition in Rule 4.1 that it is up to the magistrate judge to decide whether to consider a request for a warrant made by "telephone or other reliable electronic means," or instead to require the applicant and the attesting agent to present the application in person.

E. PROPOSED RULE 6 – The Grand Jury

COMMENT: The proposed amendment permits a grand jury return to be taken by video conference. **The FMJA endorses the proposed change**

F. PROPOSED RULE 9 – Arrest Warrant of Summons on an Indictment or Information

COMMENT: The proposed changes to Rule 9 authorizes the court to consider complaints and issuance of arrest warrants and summonses based on information submitted by reliable electronic means. **The FMJA endorses the proposed**

changes subject to its reservations and proposed revisions to proposed new Rule 4.1.

G. PROPOSED RULE 32.1 – Revoking or Modifying Probation or Supervised Release

COMMENT: The proposed change to Rule 32.1 would allow a defendant to participate, upon request, in proceedings involving revocation or modification of probation or supervised release by video teleconference. **The FMJA endorses the proposed change subject to its reservations and proposed revisions to proposed new Rule 4.1.**

H. PROPOSED RULE 40 – Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

COMMENT: The proposed change would allow a defendant to consent to participate via video conference in a proceeding on arrest for failure to appear in another district. **The FMJA endorses the proposed change.**

I. PROPOSED RULE 41 – Search and Seizure

COMMENT: The proposed change deletes provisions now found in new Rule 4.1 and authorizes return of warrants by reliable electronic means. **The FMJA endorses the proposed changes subject to its reservations and proposed revisions to proposed new Rule 4.1.**

J. PROPOSED RULE 43 – Defendant's Presence

COMMENT: The proposed change allows a defendant who consents in writing to participate in arraignment, trial and sentencing in misdemeanor cases via video conference. **The FMJA endorses the proposed change.**

K. PROPOSED RULE 49 – Serving and Filing Papers

COMMENT: The proposed change authorizes local rules permitting papers to be filed, signed or verified by electronic means. **The FMJA endorses the proposed change.**

II. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

GENERAL COMMENT: As an initial matter, the FMJA doubts the value of restyling the Federal Rules of Evidence. Unlike the Civil Rules and the Criminal Rules which had undergone substantial evolution and amendment since they were first adopted, the Rules of Evidence are comparatively recent and were adopted as a complete body. There have been very few amendments. The definitions and phrasing have become part of the lexicon of the trial courts and trial bar. There seems to be little to gain and a risk of much confusion in restyling for restyling's sake, as shown in the discussion of Rule 801(c), below.

Secondly, the FMJA questions the use of "but" and "and" to begin sentences in the proposed revisions. Although the formal grammar that previously marked legal writing has been loosened, the drafting of rules calls for precision. In interpreting a rule, each word is construed to have a purpose. It is not clear what purpose is served by the words "but" and "and" in the revised rules. Take, for example, proposed Rule 611(c), which reads, in part:

> Ordinarily, the court should allow leading questions on cross-examination. And the court should allow leading questions when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

What is the intention of the drafters in including the word "and" in the second sentence? Is it intended to suggest that the original modifier of the first sentence ["ordinarily"] also applies to the second sentence? If so, why wasn't the first sentence drafted to include that thought, as follows:

> Ordinarily, the court should allow leading questions on cross-examination or when a party calls a hostile witness, an adverse party or a witness

identified with an adverse party.

The FMJA recommends that the use of "but" and "and" be reviewed in each proposed rule in which they appear. Unless the words serve a purpose in the rule, they should be omitted, and each respective sentence should begin with the word following "but" and "and."

The FMJA does not address every change proposed by the Rules Advisory Committee and limits its comments below to those specific proposed amendments which it believes are unnecessary or may cause confusion.

A. PROPOSED RULE 801 – Definitions That Apply to This Article; Exclusions from Hearsay

RULE 801(c) Hearsay.

COMMENT: **The FMJA strongly opposes changing current Rule 801(c), which addresses the definition of hearsay. If the Rule is to be changed, however, the FJMA suggests revision of the proposed amendment.**

DISCUSSION: The definition of hearsay as currently written is clear; it has been used for years as written, it is engraved in the law, the courts and practicing Bar are comfortable with it, and there is no real reason for the change. Importantly, the Committee Note makes no comment about the change; the only comment found in the Note relates to Rule 801(d). The FMJA believes that any modification to this long-established definition will inevitably be interpreted as having some impact on the law, and the change will create more problems than it will resolve.

The proposed revision says, "'Hearsay'" means a prior statement – one the declarant does not make while testifying at the current trial or hearing – that a party

offers in evidence to prove the truth of the matter asserted by the declarant."

The last clause – "the matter asserted by the declarant" – is misleading. The limitation should be stated differently to eliminate redundancy and to conform to established law, *i.e.,* the matter asserted **in that statement**. Hearsay is not a statement offered to bolster the truth of **any statement** made by the declarant; it is a statement offered to prove the truth of the matter asserted **in that very statement.** To delete that limitation is to suggest that the hearsay rule applies to any statement used to bolster the truth of the declarant, which is not the law.

As noted, the reiteration of "by the declarant" is redundant. The use of the word "prior" suffers from the same flaw: if the statement was not made while testifying at the current trial or hearing, then it is necessarily a "prior" statement.

The FMJA thus opposes the proposed amendment in its entirety, but suggests the following revision if Rule 803(c) is to be changed:

(c) **Hearsay.** "Hearsay" means a ~~prior~~ statement – one the declarant does not make while testifying at the current trial or hearing – that a party offers in evidence to prove the truth of the matter asserted~~ by the declarant~~.

B. PROPOSED RULE 803(6) – Records of a Regularly Conducted Activity

COMMENT: Subsection (D) erroneously refers to 902(b)(11) or (12). The reference to "Rule 902 (b)(11) or (12)" should be amended to read "Rule 902(11) or (12) because there is no subparagraph (b) in Rule 902 in the proposed Rules of Evidence.

C. PROPOSED RULE 902(11) – Certified Domestic Records of a Regularly Conducted Activity.

COMMENT: This rule is designed to allow for the admission of a domestic record under Rule 803(6) upon certification in lieu of securing the presence of a custodian or "other qualified witness" to offer testimonial certification in compliance with the rule. **The FMJA suggests that minor change will more accurately reflect the Rule's effect and suggests limited revision.**

DISCUSSION: The draft language speaks in terms of meeting the requirements of Rule 803(6) "as modified," when Rule 902(11) simply provides an alternative mechanism to "satisfy" those requirements in lieu of the person's appearance to testify. The FMJA proposes the following language be substituted for the first sentence of Proposed Rule 902(11):

The requirements of Rule 803(6)(D) for the introduction of an original or copy of a domestic record are met if accompanied by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court.

D. PROPOSED RULE 902(12) – Certified Foreign Records of a Regularly Conducted Activity

COMMENT: This rule is designed to allow for the admission of foreign, as opposed to domestic, records of regularly conducted activities under Rule 803(6) upon a written certification in lieu of securing the presence of a custodian or "other qualified witness" to offer testimonial certification in compliance with the rule. **The FMJA suggests that minor change will more succinctly and accurately reflect the Rule's effect and suggests limited revision.**

DISCUSSION: The FMJA proposes the following language be substituted for the first sentence of Proposed Rule 902(12):

In a civil case, the requirements of Rule 803(6)(D) for the introduction of an original or copy of a foreign record of regularly conducted activity are met upon certification signed in a manner which, if falsely made, would subject the maker to criminal penalty in the country where the certification is signed.