FEDERAL MAGISTRATE JUDGES ASSOCIATION

50TH ANNUAL CONVENTION - DENVER, COLORADO
JULY 23 - 25, 2012
www.fedjudge.org

February 10, 2012

11-CV-018
11-CR-004
11-EV-001

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

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

Dear Peter:

I am very pleased to submit the attached comments to the Rules Advisory Committee on behalf of The Federal Magistrate Judges Association. These well thought out comments were thoroughly discussed and considered by our Standing Rules Committee. The learned members of this committee include:

Honorable S. Allan Alexander, Northern District of Mississippi, Chair
Honorable David E. Peebles, Northern District of New York, Co-Chair
Honorable Clinton E. Averitte, Northern District of Texas
Honorable William Baughman, Jr., Northern District of Ohio
Honorable Alan J. Baverman, Northern District of Georgia
Honorable Hugh W. Brenneman, Jr., Western District of Michigan
Honorable Geraldine Soat Brown, Northern District of Illinois
Honorable Joe B. Brown, Middle District of Tennessee
Honorable Martin C. Carlson, Middle District of Pennsylvania
Honorable Waugh B. Crigler, Western District of Virginia
Honorable Judith Dein, District of Massachusetts
Honorable Marilyn D. Go, Eastern District of New York
Honorable Steven Gold, Eastern District of New York
Honorable David A. Sanders, Northern District of Mississippi
Honorable Nita L. Stormes, Southern District of Pennsylvania
Honorable Mary Pat Thynge, District of Delaware

The committee members come from all size districts and their collective experiences encompasses all types of judicial duties. In addition, the committee members often consulted with their colleagues in the course of preparing these comments. The committee's comments were reviewed and unanimously approved by the Officers and Directors of the Federal Magistrate Judges Association.

We are pleased to have this opportunity, once again, to present written comments representing the views of the Federal Magistrate Judges Association, and we welcome the opportunity to testify, if requested.

Sincerely,

Malachy E. Mannion
President
Federal Magistrate Judges Association

Chief United States Magistrate Judge
Middle District of Pennsylvania

COMMENTS OF
THE FEDERAL MAGISTRATE JUDGES ASSOCIATION
ON PROPOSED AMENDMENTS TO

THE FEDERAL RULES OF CIVIL PROCEDURE,

THE FEDERAL RULES OF CRIMINAL PROCEDURE

and

THE FEDERAL RULES OF EVIDENCE
(Class of 2013)

COMMENTS OF FEDERAL MAGISTRATE JUDGES ASSOCIATION RULES COMMITTEE ON PROPOSED CHANGES TO THE FEDERAL RULES OF CIVIL PROCEDURE, THE FEDERAL RULES OF CRIMINAL PROCEDURE and THE FEDERAL RULES OF EVIDENCE (Class of 2013)

I. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

A. PROPOSED RULE 45 – SUBPOENA

COMMENT: The proposed new Rule 45 substantially re-writes that rule in an attempt to make it clearer and more concise. The FMJA generally endorses the proposed amendment.

However, the FMJA has concerns that the terminology in subsection 45(c)(1)(B)(ii) is not consistent with terminology elsewhere in the Rule and that, as written, it will significantly increase motion practice for the trial judge in determining the meaning of the term "substantial expense" where a person must travel more than 100 miles to attend trial and deciding who has the burden of proof in the matter.

The FMJA also offers an unsolicited suggestion to establish a presumptive time for the target of the subpoena to comply with a subpoena.

Finally, the FMJA believes strongly that the decision whether to transfer a discovery motion to the issuing court should not be limited to "exceptional circumstances" or subject to veto by either a party or the non-party target, but should be left to the discretion of the court under a standard of "the interests of justice," giving due consideration to the non-party's interests.

D**ISCUSSION:**

1. Rule 45(c)(1)(B)(ii): The new provision alters the geographic scope of Rule 45 trial subpoenas. It extends the geographic boundaries beyond 100 miles from the location of the court provided: a) the target of the subpoena resides or works within the state; and b) the person can comply without "substantial expense."

The FMJA has two concerns. First, the terminology within the Rule, as a whole, is not uniform and is subject to diverse and potentially inconsistent interpretations, depending on the circumstances. Although some terms are carry-overs from the old Rule, it is clear that the new Rule was intended to both simplify and clarify practice as well as to eliminate ambiguity as best it can.

Proposed Rule 45(c)(1)(B)(ii), establishing the geographic scope of a trial subpoena, uses the standard "substantial expense" although Rule 45(d)(3)(a)(iv) specifies "undue burden" as the standard under which a subpoena must be quashed. A third standard appears in Rule 45(d)(1), which places a burden on the party issuing a subpoena to avoid imposing "undue burden or expense." Finally, Rule 45(d)(2)(B)(ii) protects a non-party responding to a document subpoena from "significant expense."

The FMJA is uncertain whether the drafters intended for different standards to be applied in these different contexts. Different terminology implies different standards, but the differences in terminology here are difficult to define and apply. For example, do the drafters intend to distinguish between "substantial" and "significant"? If the intent is that courts should apply different standards, the terms setting those standards should be more clearly defined. If not, then the Rule should employ the same language throughout.

A greater concern relates to who bears the burden of establishing whether the subpoena is quashed or enforced under the proposed "substantial expense" standard of Rule

45(c)(1)(B)(ii). As it stands, the proposed Rule seems to place the burden on the issuing party to show that compliance will not require substantial expense. We believe the subpoena target is in the best position to provide information concerning the burden and expense of compliance and, thus, is in the better position to assert any opposition to the subpoena based on that information. The FMJA believes that this is what is contemplated by proposed Rule 45(c)(1)(B)(ii), but suggests that a better place to set forth the standard would be in subparagraph 45(d)(3)(A) in the context of quashing or modifying a subpoena.

2. **Rule 45(d)(3)(A)(i):** There are no changes proposed here, but the FMJA suggests that the phrase "fails to allow a reasonable time to comply" could be better defined. Many districts have invoked presumptive time periods to lend some consistency to what the court will deem "reasonable." The question often arises and should be addressed more definitively by the proposed Rule.

   The FMJA suggests establishing a presumptively reasonable time, such as fourteen days, for compliance with a subpoena. Doing so would eliminate uncertainty from district to district, assuring more consistency among the circuits. The presumption, of course, should be rebuttable depending upon the circumstances of the case.

3. **Rule 45(f):** The new provision would allow under some circumstances a court in one district to transfer motions relating to a subpoena to the issuing court.

   The FMJA endorses the concept of transferring such disputes, but feels strongly that limitations built into the proposed Rule are unduly restrictive and may undercut an issuing court's ability to manage effectively and consistently cases pending before it. In fact, the FMJA believes that transfer of such disputes should be the preferred practice.

The first sentence of the Rule permits the court where compliance is required to transfer a motion to the issuing court in only two circumstances: a) Where the parties and the target of the subpoena consent; or b) where the court finds "exceptional circumstances." The comment to the Rule states that "transfers will be truly rare events."

The FMJA, whose members have substantial responsibility for supervising discovery in civil cases, including disputes arising under Rule 45, is of the opinion that neither party should have "veto" power. It is entirely possible that possession of such power may lead to forum shopping if a party is unhappy with previous rulings on similar matters in the issuing court. The real inconvenience, if any, will in most cases be visited upon the person who must comply with the subpoena, but the FMJA believes that although that person's concerns should be given careful consideration, even that person should not have absolute veto power.

Secondly, the FMJA believes that the transfer authority set out in the proposed rule is an important improvement that should not be limited to the parties' agreement or exceptional circumstances. Under the current rule, magistrate judges dealing with enforcement of a subpoena relating to a case in another district are required to make rulings in cases with which they have no familiarity, out of the context of the total case. Their ruling may conflict with or even interfere with previous rulings in the same case. The proposed rule addresses this problem by allowing transfer from the district where compliance is sought to the "issuing district," that is, the district where the case is pending. In most situations, the FMJA believes, a transfer will significantly advance the just and efficient resolution of the dispute. The issuing court will have entered prior orders or made prior rulings on discovery issues, and sometimes substantive issues, of which the other court will have no knowledge, particularly in complex cases or cases which have involved voluminous discovery or multiple parties or discovery being sought in multiple districts. It is frequently the case that the matters raised by such a motion are connected to other matters that have already been addressed in the issuing

court. In addition, if a motion is pending in another court, the issuing court has no control over when or how a motion may be decided, and the other court will have no knowledge of scheduling concerns known only to the issuing court, *i.e.*, whether the discovery sought will interfere with a discovery deadline, motion schedule or trial date.

Generally, magistrate judges would prefer to assume the full management of discovery matters in their pending cases to assure consistency and efficient case management. Moreover, magistrate judges have reservations about making rulings that may make things more difficult in a case pending elsewhere.

Before transferring a motion, the magistrate judge should give careful consideration to the interests of the subpoenaed party, but it is highly unlikely that the person subpoenaed would be required to actually appear in person in the issuing court. Magistrate judges are sensitive to the financial burdens that might be imposed by transfer and would be likely to decide the motion either on the papers or after a hearing via telephonic or other electronic means to minimize delay and expense. Any concerns the committee may have on this score could be addressed in the comment to the Rule making clear that courts should consider these alternative means of hearing the parties.

The FMJA believes that a more appropriate standard for determining whether an adversarial proceeding under Rule 45 should be transferred should be the interests of the person subpoenaed and the interests of justice. The decision should be left to the sound discretion of the transferring court.

B. PROPOSED RULE 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

COMMENT: The FMJA endorses the purpose behind the proposed conforming amendment to Rule 37(b)(1), but suggests re-wording the amendment to conform the terminology to that used in amended Rule 45.

DISCUSSION:

The proposed amendment to Rule 37(b)(1) is needed, but the FMJA suggests that because its purpose is to conform it to amended Rule 45, both rules should use consistent terminology to assure that the intent of each is clear. The FMJA respectively suggests that substituting the following language will accomplish the same purpose as that intended by the proposed amendment with a minimum of confusion:

If a motion is transferred pursuant to Rule 45(f), and the deponent fails to obey an order by the issuing court to be sworn or to answer a question, the failure may be treated as contempt of either the issuing court or the court where the motion was brought.

II. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

A. PROPOSED RULE 11 – PLEAS

COMMENT: Proposed new Rule 11(O) adds a requirement that the court must advise a defendant as a part of a plea colloquy that a defendant who is not a United States citizen may be removed from the country, denied citizenship and denied future admission to the United States. The FMJA endorses the proposed amendment.

B. PROPOSED RULE 12 – PLEADINGS AND PRETRIAL MOTIONS

COMMENT: The amendments to Rule 12 clarify when certain motions must or may be raised and the consequences of failure to raise issues via motion in a timely matter. The FMJA endorses the proposed amendment.

III. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

PROPOSED AMENDMENT TO RULE 803(10) – EXCEPTIONS TO THE RULE AGAINST HEARSAY – REGARDLESS OF WHETHER THE DECLARANT IS AVAILABLE AS A WITNESS

COMMENT: The intent of the proposed amendment is to conform admissibility requirements relating to a testimonial certificate to the Supreme Court's holding in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). The FMJA endorses the proposed amendment.