COMMENTS OF FEDERAL MAGISTRATE JUDGES ASSOCIATION RULES COMMITTEE ON PROPOSED CHANGES TO THE FEDERAL RULES OF CRIMINAL PROCEDURE, FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL RULES OF EVIDENCE (Class of 2010)

08-CR-008
08-CV-161
08-EV-003

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

A. PROPOSED RULE 5(d)(3) – Initial Appearance; Crime Victim's Rights

COMMENT: The Federal Magistrate Judges Association considers the proposed amendment unnecessary and superfluous because the court is already required by the Bail Reform Act to consider the safety of any person or the community when deciding whether a defendant should be released pending trial.

DISCUSSION: In light of the court's obligation under the Bail Reform Act, to consider the safety of any person in deciding whether to release a defendant and under what conditions, the FMJA believes that the proposed amendment is redundant and unnecessary. The present rule specifically states that the court's decision is to be made "as provided by statute or these rules," and the new language could be construed as elevating the rights of victims over the other considerations which the Bail Reform Act articulates. Moreover, there is some concern that adding this provision to the rule would imply a different or an even greater duty on the court than that already imposed by the Bail Reform Act and the Crime Victim's Rights Act (CVRA).

B. PROPOSED RULE 12.3(a)(4)(C) & -(D) – Disclosing Witnesses

COMMENT: Rule 12.3 applies when a defendant is charged with a crime he allegedly committed while acting in an undercover capacity for a "law enforcement agency or federal intelligence agency." The FMJA endorses the proposed changes.

C. PROPOSED RULE 15 – Depositions held outside the United States

COMMENT: The FMJA endorses the proposed change, which would expressly permit the taking of depositions in a foreign country without the presence of the criminal defendant.

DISCUSSION: This procedure would only be employed when the witness could not be brought to the United States for a deposition and where it was impractical for certain specified reasons to have the defendant taken to the foreign country to be present at the deposition. Before such a procedure could be employed, the court would have to make "case specific findings" that the deposition was "necessary for further and important public policy" and there would have to be means for the defendant to meaningfully participate in the deposition. The FMJA believes that this rule is reasonable and necessary in those few cases where a foreign deposition is necessary, and the defendant cannot be physically present.

D. PROPOSED RULE 21 – Transfer for trial

COMMENT: The FMJA endorses the proposed change, which makes clear that the court must consider the convenience of victims in deciding whether to transfer a proceeding to another district for trial.

DISCUSSION: The proposed change merely assures that considerations of a victim's rights under the CVRA are addressed along with the interests of the parties and witnesses in a decision on whether to transfer all or part of a proceeding. The FMJA believes that because the rule specifically enumerates that the convenience of parties and witnesses must be considered, it is prudent to include victims' entitlement to the same consideration.

E. PROPOSED RULE 32.1 – Release or detention pending revocation hearing

COMMENT: The FMJA endorses the proposed change, which clarifies the standard to be applied in release or detentions relating to a person on probation or supervised release pending a revocation hearing.

DISCUSSION: The proposed revision would specifically provide that to obtain release pending a revocation hearing, a defendant who has been found guilty of an offense and is arrested on a petition to revoke must establish "by clear and convincing evidence" that the defendant will not flee or pose a danger to the community. The proposed amendment by adding the words "by clear and convincing evidence" ends the confusion of what burden of proof is applicable in this situation. The FMJA believes that this clarification is appropriate.

II. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

A. PROPOSED RULE 26(a)(2) and (b)(4) – Expert Trial Witness Discovery

COMMENT: The proposed changes extend work product protections to preliminary drafts of expert reports. The FMJA generally endorses the proposed changes, but suggests that it would be helpful to address questions related to preservation of draft expert reports and the necessity for filing privilege logs when a party seeks protection of this sort of work product material either in the Rule or the Committee Note.

DISCUSSION: The proposed changes in Rule 26 serve a number of needed purposes in both the conduct of expert discovery and in its oversight by the courts. Many districts have local rules or standing orders which incorporate these changes in one form or another, while others rely on the body of decisional authorities developed in their districts or circuits to mediate principles which are set forth in the proposed amendments. By the same token, there are multi-judge districts where the practices relating to expert disclosures and evidence acquisition may vary from judge to judge.

The FMJA believes the proposed changes bring needed national uniformity to discovery practices relating to experts which will establish brighter lines for counsel's decision-making in the discovery process and reduce the number of areas over which there could be a dispute. Thus, considerable litigation expense to all parties could be reduced. Although some counsel may see many of the detailed disclosure requirements as more burdensome than currently experienced in their districts, others will recognize that a greater degree of clarity is being brought to the way expert

discovery is conducted.

The proposed changes are lengthy and rather detailed. Except as to the provisions of Rule 26 (b)4(B) and (C), no one on the FMJA Rules Committee could recommend a better way to both prescribe and circumscribe the conduct of expert discovery than the proposed changes offered. The language for each provision chosen by the rule makers establish a useful template for courts in resolving conflicts. They essentially codify a collection of practices developed over the course of administrating the discovery rules and provide a single, uniform source for the trial courts in making the initial decisions and for the courts of appeal in reviewing those decisions.

However, neither Rule 26(b)4(B) and (C) nor the Committee Note addresses questions related to preservation of draft expert reports and the necessity for filing privilege logs when Rule 26 is asserted to protect the disclosure of this sort of work product material. Although these two subjects currently are covered by various circuit authorities, it would be helpful to set forth some clarification, either in the Rule or in the Committee Note, regarding whether the changes in the Rule were intended to alter any of those authorities .

In short, the FMJA believes the proposed changes to Rule 26(a) and (b), though lengthy and rather detailed, and with the clarification requested, will offer uniformity where there has been significant inconsistency among districts, will narrow issues over which parties can have legitimate disputes and provide substantial guidance to the courts should disputes arise.

B. PROPOSED AMENDMENTS TO RULE 56 – Summary Judgment

COMMENT: The proposed changes to Rule 56 would substantially re-write that rule. The drafters' stated intention is not to change the standard for summary judgment, but to make the procedure for filing and considering motions for summary judgment more uniform across the country.

The major change is to require the point-counterpoint approach to statements of fact supporting or opposing summary judgment. Many districts have experimented with that approach. While some have adopted it as part of their local rules, other districts have tried it and discarded it. The drafters have concluded that national uniformity trumps local policy with the approach. While the FMJA thinks that conclusion should be debated nationally as a policy issue, these comments proceed from the assumption that the point-counterpoint approach will be adopted in the Federal Rules, and will deal with the specific proposals.

The FMJA believes that many of the changes will be beneficial, but has concerns about others.

DISCUSSION:

1. **Rule 56(a):** The proposed Rule would add "or Partial Summary Judgment" to the title. It would also change "genuine issue as to any material fact" (current Rule 56(c)) to "no genuine dispute as to any material fact." It would require the court to state on the record the reasons for granting or denying the motion.

   The FMJA agrees with those changes. The drafters'

comments invite views on whether "should grant" ought to be "must grant." The FMJA believes that "should grant" is the appropriate phrase. It reflects the current law. Additionally, using "must grant" along with an explicit endorsement of motions for "partial summary judgment" might suggest that the court "must" entertain motions that address the case in a piecemeal fashion.

2. **Rule 56(b):** Proposed Rule 56 (b) sets out a timetable for motions for summary judgment "unless a different time is set by local rule or the court orders otherwise in the case." In contrast, Rule 56(c), which sets out the point-counterpoint procedure, can be varied only if "the court orders otherwise in the case." In the "Detailed Discussion and Questions, the drafters state that authority to depart "in the case" does not authorize local rules inconsistent with the national rule and does not authorize departure from the national procedures by a standing order.

3. **Rule 56(c):** The FMJA has concerns about the "in the case" requirement of Rule 56(c). Many districts now have local rules developed over long experience with the point-counterpoint procedure, which, for example, set out a presumptive limit on the number of statements of fact, or require a responding party to state or summarize the statement to which it is responding (so that the judge has only one document to look at), and the like. Under the proposed 56(c), presumably those procedures would have to be ordered in each case. Each judge across the country would decide his or her own procedure and impose it by order in each of his or her cases. This would not only impose a burden on the judge, but, in the absence of local rules, would also create more uncertainty about procedures even within a single district, defeating the drafters' goal of more uniformity. The FMJA suggests that the rule permit districts and judges to *supplement* the procedures in Rule 56(c) by local rule or standing order.

4. **Rule 56(c)(3):** The proposed change would allow a party to accept or dispute a fact either generally or for purposes of the motion only.

   The FMJA agrees that change would be beneficial. A particular fact may not be relevant to the motion at hand but may become relevant if the motion is denied. For example, in a motion for summary judgment based on the statute of limitations, the plaintiff would be able to admit some of the moving defendant's stated facts, while reserving the right to contest them if the motion is denied.

5. **Rule 56(c)(4)(A)(ii):** This amendment would permit a statement of fact or the disputing of a statement of fact to be supported by either "a showing that the materials cited do not establish the absence or presence of a genuine dispute" or "a showing . . . that an adverse party cannot produce admissible evidence to support the fact."

   The FMJA has a number of concerns about this subsection. First, it invites legal argument into the statement of facts, which should ideally be a straightforward presentation of evidence. Although the drafters state that a "showing" is not an argument, in practice it will become argument. Secondly, the subsection is confusing and unclear.

The first "showing" apparently relates to a response to "materials cited" in the moving party's statement. It is unclear why that is necessary. If the non-moving party believes that the fact stated is established by the materials cited but the fact is irrelevant, the party can admit the fact for purposes of the motion only (pursuant to Rule 56(c)(3)), and argue the irrelevance in the brief. If the non-moving party believes that the materials cited do not support the fact because the materials are inadmissible, the party may so state pursuant to 56(c)(5).

The second "showing" is apparently intended to be used in a situation in which the moving party does not have the burden of production, although the rule is not limited to that situation. A plaintiff cannot obtain summary judgment simply by showing that the defendant cannot produce evidence to contest a fact. But the rule does not make that clear. Furthermore, as a drafting matter, the relationship of this "showing" to Rule 56(c)(4)(A) is confusing. "A statement that a fact cannot be genuinely disputed" cannot be supported by "a showing that the adverse party cannot produce admissible evidence to *support* the fact." Presumably, the second showing would only be applicable to "A statement that a fact . . . is genuinely disputed."

The FMJA recommends that proposed Rule 56(c)(A)(4)(ii) be revised to make it clearer.

6. **Rule 56(f)(2):** The proposed amendment would require the court to give notice and reasonable time to respond, presumably by oral argument or written briefs, before the court grants or denies a motion for summary judgment on grounds not raised in the motion, the response, or the reply. This proposed new subsection, however, must be read in conjunction with proposed Rule 56(c)(4)(B) which also requires the court to give notice under subsection (f)(2) before granting a motion for summary judgment, but not before denying a motion for summary judgment, on the basis of materials in the record not called to the court's attention under subsection (c)(4)(A). According to the Committee Notes, the purpose of proposed subdivision (f)(2) is to incorporate into Rule 56 a number of procedures that have developed in practice.

   The FMJA agrees that notice and opportunity to be heard should be provided to the parties before the court rules on a summary judgment motion on a ground not raised by a party. The parties should be allowed time to research and brief the new issue, if necessary. If the parties are not allowed to do so, the court would more than likely face numerous motions to reconsider or renewed summary judgment motions.

The FMJA believes the distinction between subsection c(4)(B)'s limitation on giving notice only if the motion is granted and subsection f(2)'s requirement for giving notice if the motion is granted or denied is confusing. The distinction is so subtle that failing to give notice under c(4)(B) would give rise to further argument as to whether notice should have been given. The FMJA is of the opinion these two subsections should be consistent.

III. PROPOSED AMENDMENTS TO RULE 804(b)(3) OF THE FEDERAL RULES OF EVIDENCE

COMMENT: The FMJA does not oppose the proposed changes to Fed. R. Evid. 804(b)(3), but offers the following comments and suggestion for a slight modification to the language of the proposed amendment.

DISCUSSION: The Committee Note indicates that the purpose of the amendment is to make clear that the corroborating circumstances requirement applies to all declarations against penal interest in criminal cases, regardless of which party, the prosecution or the defendant, offers the declaration. The FMJA is in agreement with that general principle.

The FMJA believes, however, that adding the words "or proceeding" to the proposed amendment would render it more consistent with other pertinent rules of evidence. More particularly, Fed. R. Evid. 1101(b) provides that the Federal Rules of Evidence "apply generally . . . to criminal cases and proceedings." Adding the words "or proceeding" so that the proposed amendment would read "in a criminal case or proceeding" would render the amended Rule 804(b)(3) consistent with Rule 1101(b).

Furthermore, the FMJA believes that adding the words "or proceeding" would render the amended Rule 804(b)(3) more consistent with the Federal Rules of Criminal Procedure. The word "proceeding" is used repeatedly throughout the Federal Rules of Criminal Procedure. For example, Fed. R. Crim. P. 1(a)(1) states: "These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States." See also, by way of example, Rules 2, 12(a), 12.1(f), 12.2(e), 21.

Finally, adding the words "or proceeding" would also remove any ambiguity concerning whether the proposed amended rule is intended to apply only to criminal trials (*i.e*, cases?) as opposed to being applicable to all criminal proceedings to which the rules of evidence would otherwise be applicable.