

**COMMENTS OF THE FEDERAL MAGISTRATE JUDGES
ASSOCIATION RULES COMMITTEE ON PROPOSED CHANGES
TO THE FEDERAL RULES OF CRIMINAL PROCEDURE AND
EVIDENCE (Class of 2008)**

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

**A. PROPOSED RULES IMPLEMENTING THE CRIMES
VICTIMS' RIGHTS STATUTE**

COMMENT:

The Federal Magistrate Judges Association (FMJA) supports the rules that are proposed to implement the Crimes Victims' Rights Act (CVRA), codified at 18 U.S.C. § 377.

DISCUSSION:

RULE 1 (Scope; Definitions)

The proposal is to add a subsection (11) to part (b), regarding definitions, that states that the word "victim" means a "crime victim" as defined in the CVRA. The proposed amendment also includes, in the final sentence of subsection (11) the provision that a person accused of an offense is not a "victim" for purposes of the Federal Rules of Criminal Procedure. The FMJA agrees that it is appropriate to incorporate the statute by reference. Any future changes by Congress will automatically become effective without the need for a further amendment. The FMJA also agrees that the rule should make clear that the accused is not a victim under the Federal Rules of Criminal Procedure since the CVRA provides that a person accused of a crime may not obtain any form of relief under the Act.

RULE 12.1 (Notice of Alibi Defense)

The proposed amendment provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised. The rule further provides that if a defendant demonstrates a need for this information, disclosure may be ordered or an alternative procedure may be fashioned to allow the preparation of a defense and protect the victim's interests. The FMJA supports this amendment because it is required by the CVRA.

RULE 17 (Subpoena)

Rule 17 governs the issuance of subpoenas to attend and testify. At present, the rule provides in subsection (c) that a subpoena may order the witness to produce designated books, papers, documents, data, or other objects and that the court may direct the witness upon whom the subpoena will be served to produce these items in court before trial or before they are to be offered in evidence. The proposed amendment would add a subsection (3) to subsection (c) to provide a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. The amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The order may be issued upon an ex parte application, but the court may require that notice be given to the victim.

Although the FMJA supports the amendment because it is required by the CVRA, the FMJA notes that the term "personal and confidential information" is not defined. Consideration should be given to using language from the CVRA to describe information about a victim that is not to be obtained without a court order. E.g., "[A] subpoena requiring the production of information which, if produced, will infringe on the victim's dignity or privacy may not be served on a third party without a court order." Consideration should also be given to including in the comments examples of the sort of information which might reasonably be considered to trigger Rule 17(c)(3)'s court order application process.

RULE 18 (Place of Trial)

The proposed amendment to Rule 18 would require the court to consider the convenience of victims, as well as the defendant and witnesses, in setting the place for trial. The FMJA supports the amendment because it implements the victim's right to attend proceedings under the CVRA.

RULE 32 (Sentencing and Judgment)

Several amendments to Rule 32 are proposed to implement provisions of the CVRA. The definitions of "victim" and "crime of violence or sexual abuse" are deleted because a broader definition of "victim" set forth in the CVRA is incorporated in Rule 1. The rule is also amended to implement the victim's right under the CVRA to full and timely restitution. The amended rule also clarifies that victim impact information should be treated in the same way as other information contained in the presentence report. The rule is further amended to make clear a victim has the right to be heard at sentencing. The FMJA supports these amendments because they are required by the CVRA.

NEW RULE 60 (Victim's Rights)

The rule implements several provisions of the CVRA. The rule provides for notice to victims of public court proceedings; states that a victim must not be excluded from any public court proceeding unless the court finds by clear and convincing evidence that the victim's testimony would be materially altered by attending the proceeding; makes clear the right of a victim to be heard at various proceedings. The rule also clarifies that failure to provide relief under this rule is never a basis for a new trial. The FMJA supports the rule as a correct implementation of the CVRA.

B. PROPOSED AMENDMENTS TO RULES 29 AND 41.

Rule 29 (Motion for Judgment of Acquittal)

COMMENT:

The FMJA supports the proposed change to Rule 29 which allows the government to seek appellate review of any judgment of acquittal.

DISCUSSION:

The present Rule 29 allows the court to grant preverdict acquittal which is not subject to appellate review because of the Double Jeopardy Clause. In response to the Department of Justice's repeated requests for modification of the present rule, the proposed amendment addresses the impact that erroneous and unreviewable preverdict acquittals have had on the administration of justice by limiting such rulings. Contrary to the urging of the Department of Justice, the proposed rule does not prohibit preverdict acquittals. The elimination of preverdict acquittals would severely impinge upon trial court's ability to manage criminal cases, would increase the length and complexity of trials and would potentially increase costs and expense to defendants. The proposed amendment allows preverdict acquittals only when a waiver, which permits the government to appeal, and if the appeal is successful, to retry its case on remand, is made by the defendant. The court may not grant the motion in the absence of a defendant's waiver of Double Jeopardy rights. See Proposed Rule 29(b)(2). In matters involving multiple defendants, any defendant may move for judgment of acquittal.

When a defendant moves for judgment of acquittal at the close of the government's evidence or at the close of all the evidence, in the absence of a waiver by the moving defendant, under proposed Rule 29(b)(1) the court has two options: deny the motion or submit the case to the jury and reserve decision until after a verdict is returned. As under the prior Rule, the court must grant the motion if the government's evidence is insufficient. The same procedure applies in

the absence of a waiver, when a defendant moves after the jury is discharged and the government plans to retry the case, that is, the court either may deny the motion or may reserve decision by proceeding with the retrial, submitting the matter to a new jury and ruling on the reserved motion after verdict.

The proposed rule provides that the court must advise and review the waiver requirement with the defendant in open court by making a record that the defendant knowingly, voluntarily and intelligently waived his Double Jeopardy rights. See Proposed Rule 26(b)(2).

Rule 41 (Search and Seizure)

COMMENT:

The FMJA supports the proposed addition of Rule 41(b)(5) which authorizes a magistrate judge to issue search warrants for certain locations located outside any state or federal judicial district, including American Samoa. The FMJA is not aware of any reason why the amendment should not apply to American Samoa. All of the locations identified are locations in which the U.S. has a legally cognizable interest or in which it exerts lawful authority and control.

DISCUSSION:

The proposed amendment to Rule 41 would authorize a magistrate judge to issue a search warrant for property located within the jurisdiction of the United States but not within any state or any federal judicial district. These locations include United States territories, possessions, and commonwealths, as well as the premises of United States diplomatic or consular missions in foreign countries and the foreign residences of personnel assigned to such missions. Venue for the application would lie in any district in which activities related to the alleged crime under investigation occurred, or in the District of Columbia.

II. PROPOSED RULE 502 FEDERAL RULES OF EVIDENCE

COMMENT:

The FMJA supports those portions of new Rule 502 which the Advisory Committee on the Rules of Evidence has promulgated and proposed for adoption. The FMJA takes no position on the provisions set forth in subsection (c) and entitled "Selective Waiver" since those provisions are not proposed for adoption at this time.

DISCUSSION:

New Rule 502 addresses issues raised by the effect of disclosure of attorney client and work product materials, in light of the costs of reviewing the volume of electronic information now being produced in litigation. The purpose of the rule is also to resolve the concern that any disclosure of privileged information will operate as a subject matter waiver. Under the rule, the inadvertent disclosure of privileged information would not effect a waiver if reasonable measures were taken to prevent the disclosure, and the holder of the privilege made prompt efforts to rectify the error. Also the disclosure of privileged information would not constitute a waiver of the privilege as to other information concerning the same subject matter unless fairness so requires. The rule also provides that a federal court confidentiality order concerning preservation or waiver of privilege is enforceable against non-parties in any federal or state proceeding. The rule further makes clear that any agreement to limit the effect of waiver by the disclosure of privileged information between the parties binds only the parties to the litigation unless the agreement is made part of a court order.

An important goal of recent amendments to the Federal Rules of Civil Procedure is the reduction of the cost of and delay to discovery arising from the need to screen voluminous electronic information, and these amendments specifically encourage parties to enter into non-waiver and claw back agreements. The FMJA believes that new Rule 502 will support this goal by providing predictable and uniform

standards under which parties can determine the consequences of a disclosure of information. The rule, to be fully effective, must regulate the consequences of disclosure at both the state and federal levels. The rulemaking process, of course, cannot bind the states directly. The FMJA supports the effort of the Advisory Committee to encourage Congress to enact the rule directly so that it would be binding on the states.

The Advisory Committee is also seeking comments on a rule that would provide for "selective waiver" that is, that disclosure of protected information to a government agency conducting an investigation would not constitute a general waiver of the attorney client or work product privilege. The FMJA understands that the rule is not proposed for adoption at this time. The FMJA therefore declines at this time to take a position on this rule.