



**U.S. Department of Justice  
Drug Enforcement Administration**

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Springfield, VA 22152

08-CV-084

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08-CR-004

Peter G. McCabe, Secretary  
Committee on Rules and Practice and Procedure  
Judicial Conference of the United States  
Washington, DC 20544

SUBJECT: *Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure*

Dear Mr. McCabe:

Thank you for your letter of August 31, 2008, in which you invite the Drug Enforcement Administration (DEA) Office of Chief Counsel to comment on the subject proposed amendments. We have three observations or questions which we would like to bring to your attention.

*Proposed Amendment to FED. R. CRIM. P. 15*

Proposed FED. R. CRIM. P. 15(c)(3)(D)(iii) provides in part that a witness outside the United States may be deposed without the physical presence of the defendant if the court makes a number of case-specific findings. Where the defendant is not in custody, one of the required judicial findings is that "no reasonable conditions will assure an appearance [of the defendant] at the deposition or at trial or sentencing[" Since the proposed amendment addresses the circumstances under which the deposition may be taken of a witness who will be unavailable for trial, it is unclear why the defendant's availability for the trial or sentencing would be a factor. If the defendant is available for the trial but the proposed witness is not, the deposition testimony of the witness would be precluded under the proposed revision. This language would substantially restrict the trial court's ability to preserve testimony of a witness outside the United States..

It is also unclear how a party would meet its burden to establish both the requirements of FED. R. CRIM. P. 15(c)(3)(D)(iii) that no reasonable conditions will assure the appearance at the deposition (or at trial or at sentencing) of an out-of-custody defendant, and of FED. R. CRIM. P. 15(c)(3)(E) that the defendant can meaningfully participate in the deposition through reasonable means. For example, under the circumstances where a defendant is not in custody and is also unlikely to appear at the deposition (for example, a defendant who has absconded), it seems extremely unlikely that the government could establish that the defendant can still participate

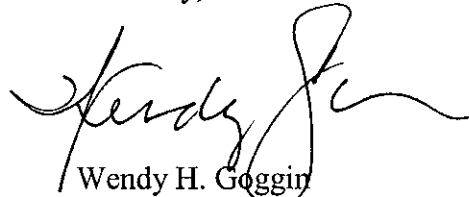
meaningfully through reasonable means. Such a case might still be one where a trial court would favor preservation of testimony of the non-U.S.-based witness. The Rule would seem to prohibit the court from ordering a deposition under these circumstances. While this may reflect the primacy of a defendant's right to confrontation, it may also be an unintended consequence of the amended Rule's language.

*Proposed Amendment to FED. R. CIV. P. 26*

The Committee states that it has been assured by many attorneys that the amendment to Fed. R. Civ. P. Rule 26(a)(2)(C)(ii) requiring a summary of facts/opinions to which an expert witness is expected to testify will provide an adequate basis for examination at trial without incurring the expense of a deposition. We anticipate that many attorneys will still want to conduct a deposition and therefore question whether the requirement will meet the goal of reducing litigation costs.

If you require additional information on this matter, please contact me at (202) 307-8030/FAX -4041.

Sincerely,



Wendy H. Goggin  
Chief Counsel