

Winter 2017, Vol. 17 No. 2

Lemons and Lemonade: Making the Most of Grounds for Transferring Venue

By Thad A. Davis and Kelsey J. Helland – March 6, 2017

A federal criminal defendant may want to change venue if the defendant risks facing a potentially tainted jury pool or if the original district is inconvenient. These two grounds for transfer are governed, respectively, by subdivisions (a) and (b) of Federal Rule of Criminal Procedure 21.

Sometimes, a defendant can plausibly argue for both grounds, such as when the defendant has been subject to negative pretrial publicity in the district of prosecution *and* the defendant and witnesses reside outside of that district. In considering whether to bring a motion to transfer, defense counsel should evaluate whether the motion would be strengthened by seeking relief under both of Rule 21's available grounds. Indeed, a review of recent cases suggests that a defendant may be able to get the case moved by seeking relief under Rule 21(b) even though the pretrial prejudice alone would not be sufficient to transfer the case under Rule 21(a).

Background: The Text of Rule 21

Rule 21(a) provides that, “[u]pon the defendant’s motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.” The defendant carries a substantial burden in establishing that pretrial prejudice is “so great” that continuances, gag orders, voir dire, and other safeguards are insufficient to preserve the right to a fair trial. *See United States v. Ayala*, 64 F. Supp. 3d 446, 450 (E.D.N.Y. 2014). As a result, cases granting motions to transfer under Rule 21(a) are extremely rare, as discussed below.

Rule 21(b) offers an easier standard. The text of Rule 21(b) reads thus: “Upon the defendant’s motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.” A defendant bringing a Rule 21(b) motion does not need to convince the court that the inconvenience is “so great” that the defendant would be prejudiced; rather, the defendant need only persuade the court that transfer is worthwhile. *In re Balsimo*, 68 F.3d 185, 187 (7th Cir. 1995) (“Nothing in Rule 21(b) or in the cases interpreting it place on the defendant seeking a change of venue the burden of establishing ‘truly compelling circumstances’ for such

CRIMINAL LITIGATION

SECTION OF LITIGATION

Winter 2017, Vol. 17 No. 2

a change. It is enough if, all relevant things considered, the case would be better off transferred to another district.”).

Rule 21(b) Motions: More Successful Than Rule 21(a) Motions

Given the differences in the two standards, it should come as no surprise that motions to transfer a case for convenience under Rule 21(b) tend to be more successful than those based on prejudice under Rule 21(a). In a review of published district court decisions ruling on Rule 21(a) motions in the past five years, zero out of the seven granted the motion.

In fact, it appears that the last published district court decision granting a motion to transfer for prejudice under Rule 21(a) was the Oklahoma City bombing case in 1996. *United States v. McVeigh*, 918 F. Supp. 1467, 1474 (W.D. Okla. 1996). Since then, motions to transfer for pretrial prejudice have been denied in several high-profile cases. *E.g.*, *Skilling v. United States*, 561 U.S. 358, 385 (2010) (Enron executive); *United States v. Tsarnaev*, 157 F. Supp. 3d 57 (D. Mass. 2016) (Boston Marathon bomber); *United States v. Lindh*, 212 F. Supp. 2d 541, 549 (E.D. Va. 2002) (American member of the Taliban).

In contrast, district courts granted Rule 21(b) motions to transfer for convenience in four out of eleven published decisions in the last five years.

Of course, these small sample sizes caution against reading too much into the numbers. And even if the eleven Rule 21(b) cases that were reviewed are representative, it must be noted that Rule 21(b) motions were still denied about twice as often as they were granted. Nonetheless, it appears that Rule 21(b) motions are regularly successful, whereas Rule 21(a) motions are virtually never granted.

Overlap in Rule 21(a) and Rule 21(b): Transfer Opportunity

Because Rule 21(b) motions tend to be more successful, defendants should consider arguing that pretrial prejudice that doesn't pass the Rule 21(a) threshold can nonetheless tilt the scales in favor of transferring under Rule 21(b).

Pretrial prejudice is not explicitly one of the ten factors that district courts look to in ruling on a Rule 21(b) motion to transfer for convenience. *See Platt v. Minn. Mining & Mfg. Co.*, 376 U.S. 240, 243–44 (1964). However, a defendant can argue that pretrial prejudice is relevant to the tenth *Platt* factor: “any other special elements which might affect the transfer.” Or,

CRIMINAL LITIGATION

SECTION OF LITIGATION

Winter 2017, Vol. 17 No. 2

alternatively, a defendant can argue that pretrial prejudice is separate from the *Platt* factors and worthy of independent consideration under Rule 21(b)'s "interest of justice" analysis.

Very few courts have explicitly considered the overlap of Rule 21(a) and Rule 21(b), and the decisions of those that have are mixed.

In the decades-old case of *Jones v. Gasch*, the D.C. Circuit held that pretrial prejudice was "not eligible for consideration under Rule 21(b)." 404 F.2d 1231, 1238 (D.C. Cir. 1967). The D.C. Circuit reasoned that because Rule 21(a) specifically addresses pretrial prejudice, whereas Rule 21(b) focuses on the convenience of parties and witnesses, prejudice should not spill over into the Rule 21(b) inquiry. Similarly, in *United States v. Johnson*, the district court explained that it had "found no authority for the proposition that either the difficulty of or the time necessary for jury selection as a result of pretrial publicity is a factor relevant to a Rule 21(b) motion for change of venue." 354 F. Supp. 2d 939, 988 (N.D. Iowa 2005).

On the other hand, in the more recent case of *United States v. Wright*, the district court transferred the prosecution of a defendant who allegedly assaulted a federal courthouse employee from the Eastern District of New York—where the alleged assault occurred—to the Southern District. 603 F. Supp. 2d 506, 509 (E.D.N.Y. 2009). The court first rejected the defendant's Rule 21(a) argument as offering "not even the faintest basis for relief" because the pretrial publicity in the case was insignificant. *Id.* at 508. However, the court explained that because the alleged victim was "a member of the court family," there was reason to believe that the *appearance* of justice would be damaged if the case were not transferred, and that this could constitute a "special circumstance" in favor of transferring under Rule 21(b). *Id.* at 509.

Similarly, in the unpublished case of *United States v. Sablan*, the district court concluded that the trial of two defendants charged with killing a federal corrections officer should be transferred from the Eastern District of California to the Central District. 2014 WL 7335210, at *3 (E.D. Cal. Dec. 19, 2014). The defendants brought their motion under both Rule 21(a) and Rule 21(b), and offered an uncontroverted jury pool survey showing that as much as 60 percent of the venire was biased against them. The court did not explicitly find under Rule 21(a) that the defendants faced prejudice that was "so great" that they could not have a fair trial. *See id.* at *2–3. Instead, the court found that "[t]he presumptive cost, inconvenience and delay in securing a fair jury in this case is a strong factor weighing in favor of a change of venue," and it granted the motion on what appears to be a Rule 21(b) basis. *Id.*

CRIMINAL LITIGATION

SECTION OF LITIGATION

Winter 2017, Vol. 17 No. 2

In sum, some courts appear to be willing to grant motions to transfer under Rule 21(b) where the defendant faces *some* prejudice but perhaps not enough to qualify under Rule 21(a)'s stricter standard. If the defendant can point to other factors showing that another district would be more convenient, then all the better.

Of course, to win a motion to transfer under Rule 21(b) based in part on prejudice grounds, it helps to make the argument. Merely bringing a combined Rule 21(a) and Rule 21(b) motion without explicitly arguing that prejudice is relevant under Rule 21(b) is likely not going to cut it. In several recent cases, courts have denied such combined motions without discussing the potential overlap in the two prongs. *See, e.g., United States v. Peake*, 804 F.3d 81 (1st Cir. 2015); *United States v. Nicolo*, 523 F. Supp. 2d 303 (W.D.N.Y. 2007).

Conclusion

A federal defendant who is concerned about the fairness of a trial in the district of prosecution should consider bringing a motion to transfer venue under both prongs of Rule 21. While Rule 21(a) prejudice motions are virtually never granted, Rule 21(b) convenience motions are granted with some regularity. Some courts appear to be willing to consider prejudice—or the *appearance* of prejudice or the *logistical difficulties* involved in dealing with prejudice—as a legitimate factor favoring transfer under Rule 21(b). Hopefully, as more defendants bring combined Rule 21 motions, courts will clarify the extent to which pretrial prejudice can support a transfer under Rule 21(b).

[Thad A. Davis](#) is a partner and [Kelsey J. Helland](#) is an associate at Gibson, Dunn & Crutcher LLP in San Francisco, California.