IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE COLUMBIA DIVISION

KAREN MCNEIL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**NO. 1:18-cv-00033**
	)	
COMMUNITY PROBATION SERVICES, LLC, et al.,	)	**JUDGE CAMPBELL**
	)	**MAGISTRATE JUDGE FRENSLEY**
	)	
Defendants.	)	

ORDER

Pending before the Court are Motions to Quash (Doc. Nos. 158, 186), filed by Judge J. Russell Parkes and Judge Robert C. Richardson, Jr., respectively. Through the Motions, the judges seek to quash subpoenas issued by Plaintiffs for the judges to appear as witnesses at the hearing on their Motion for Preliminary Injunction (Doc. No. 51).

Through his Motion, Judge Parkes, a Circuit Court Judge for the 22nd Judicial District, argues the Court should quash the subpoena because it subjects him and his trial court to an undue burden; fails to allow a reasonable time to comply; and requires him to disclose privileged information. To support his Motion, Judge Parkes relies on Federal Rule of Civil Procedure 45(d)(3)(A)(i), (iii), and (iv).[1]

[1] Rule 45(d)(3)(A) provides as follows:

> (d) Protecting a Person Subject to a Subpoena; Enforcement.
>
> (3) Quashing or Modifying a Subpoena.
>
> (A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:
>
> (i) fails to allow a reasonable time to comply;

Judge Parkes argues compliance with the subpoena will require him to disclose information protected by the deliberative-process privilege. In authorizing the deposition of Judge Parkes and Judge Richardson, Magistrate Judge Frensley considered and rejected this argument over the course of three separate orders:

> Plaintiffs are entitled to a hearing on their Motion for Preliminary Injunction. The procedures used to determine the monetary conditions of release are a critical aspect of the proof necessary for the Court to rule on the Motion. It appears that Plaintiffs have sought every means possible to present this evidence to the Court without deposing the individuals mainly by seeking a stipulation of facts or deposing a witness under Rule 30(b)(6) of the Federal Rules of Civil Procedure. For understandable reasons, the County Defendants have been unable to agree to these procedures. Nonetheless, that does not change the importance of this information to the proceedings. Certainly, the judges Plaintiffs seek to depose are the best source of factual information central to the claims asserted. The Court further disagrees with the PSI Defendants position that the depositions are improper under the deliberative process privilege for judicial actors. It does not appear that it is necessary for Plaintiffs to question the judges concerning their mental process in formulating specific official judgments or the reasons motivating them, rather, the facts material to the determination relates solely to the procedures utilized to determine the monetary conditions of release. There does not appear to be any other compelling reason not to require the judges to be deposed for the limited purposes necessary to address the allegations raised in the Motion for Preliminary Injunction related to Count 15 of the Amended Complaint. Therefore, the Court will allow Plaintiffs to depose the judges on the limited issue of the facts concerning the process of setting the bond amounts for warrants for violation of probation, which are central to the issues raised in the Motion for Preliminary Injunction. Nothing in the Court's ruling is intended to require the judges to be deposed for all purposes or preclude further depositions on matters beyond the scope of the limited issues currently before the Court.

(Doc. No. 82, at 4-5).

> (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
>
> (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
>
> (iv) subjects a person to undue burden.

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In the Court's Order authorizing the deposition of two state court judges in this case, the Court considered both the necessity of the requested depositions and burdens associated with ordering judges to be deposed. While mindful of both the state court judges' workloads and schedules, it is clear that the testimony sought by Plaintiffs in these depositions is relevant and critical to the hearing on the Motion for Preliminary Injunction. The Court also considered and rejected the arguments that the deliberative-process privilege would be implicated by the narrow scope of the matters about which the judges are to be deposed. Docket No. 82. As the Plaintiffs note, they have "no need or intention to depose Judge Parkes about his decisions or mental processes in particular cases." Docket No. 87, p. 2. Plaintiffs further set forth the information they intend to discuss with the witnesses which is what the Court contemplated and considers reasonable and limited:

> Plaintiffs seek information about which factors Judge Parkes considers in general when determining conditions of release required following arrest for alleged violation of misdemeanor probation and what information is available to him in general when he considers such factors.

Id.

All depositions are burdensome. However, given the limitations on the scope of these depositions, relevance and importance of the information sought and the Plaintiffs' agreement to accommodate Judge Parkes schedule in the taking of the deposition, the Court finds the deposition is not unduly burdensome. Judge Parkes, like any witness, will be given adequate time to hear and consider the questions. Furthermore, should the Plaintiffs exceed the scope permitted by the Court and ask questions about specific cases and the mental processes or reasons motivating those decisions Judge Parkes can formulate his answers in such a way as to not reveal information protected by privilege. Thus, the Court believes that there is no compelling reason to order the deposition be conducted through written questions rather than oral deposition.

(Doc. No. 90, at 2-3).

The Court has addressed this specific issue in this case on two occasions. Docket Nos. 82 and 90. The Court has been clear that the facts for which these depositions are taken are relevant and critical to the determination of the issues raised in the Motion for Preliminary Injunction. The Court has further noted that this appears to be the only way to obtain the information necessary to present the matters to the Court. The deliberative–process privilege protects the "mental processes" and communications between certain individuals regarding their decisions. It does not prevent discovery of the general procedures utilized or facts and information available from which to make a decision. While it is true that the risk of wandering into protected grounds is greater as the focus narrows on particular cases, that potential alone does not support quashing the subpoena. The

> Court has been very clear about the permissible limited scope of the questions that may be asked and from their pleadings, it appears that the Plaintiffs both understand and intend to comply with those limitations. However, should they stray, sitting for the deposition does not constitute a waiver of any privilege.

(Doc. No. 92, at 1-2).

Neither party has cited a controlling Sixth Circuit case on the deliberative-process privilege, but the Eleventh Circuit, after extensive analysis, has held that the privilege is a qualified one:

> We conclude, therefore, that there exists a privilege (albeit a qualified one, infra) protecting confidential communications among judges and their staffs in the performance of their judicial duties . . .
>
> A party raising a claim of judicial privilege has the burden of demonstrating that the matters under inquiry fall within the confines of the privilege. The judicial privilege is grounded in the need for confidentiality in the effective discharge of the federal judge's duties. In the main, the privilege can extend *only to communications among judges and others relating to official judicial business such as, for example, the framing and researching of opinions, orders, and rulings.*

Matter of Certain Complaints Under Investigation by an Investigating Comm. of Judicial Council of Eleventh Circuit, 783 F.2d 1488, 1520 (11th Cir. 1986). The Court agrees with the Magistrate Judge that Plaintiffs' limited inquiry into the procedures used by the judges to determine monetary conditions of release does not necessarily implicate the deliberative-process privilege. A review of the depositions of the judges supports this conclusion. (Doc. Nos. 165, 166). Should Plaintiffs' questions at the preliminary injunction hearing exceed this limited inquiry, counsel for the judges and counsel for Defendants will have the opportunity to make contemporaneous objections.

Judge Parkes alternatively argues that the subpoena should be quashed because it subjects him and his trial court to an undue burden. When he filed the Motion, the preliminary injunction hearing had been set for November 27, 2018, and as part of his Motion, Judge Parkes attached

his court schedule for that time. The Court subsequently continued the hearing to January 31, 2019, and if necessary, to continue on February 1, 2019 (Doc. No. 183). In a recent filing (Doc. No. 196), Judge Parkes has attached his court schedule for the new hearing dates.[2]

To support his argument, Judge Parkes indicates he has a scheduled motion hearing set for January 28, 2019; a criminal trial set for January 28-29, 2019; three criminal trials set for January 29, 2019; two criminal trials set for January 30-31, 2019; and the "regular Maury Chancery day" on February 1, 2019. Plaintiffs argue Judge Parkes' testimony is important to sustain their burden of proof, and represent their direct examinations of both Judge Parkes and Judge Richardson should take approximately 30 minutes.

This Court is mindful of Judge Parkes' obligations and the important work of the court in the 22nd Judicial District. On the other hand, the issues in this case are important and potentially far-reaching. In an effort to avoid unnecessary disruption to the litigants scheduled to appear before Judge Parkes on the days affected, the Court will specially set Judge Parke's testimony to begin as late as 5:00 p.m. on January 31, 2019, or as early as 8:00 a.m. on February 1, 2019. Judge Parkes may file a notice with the Court in advance of the hearing stating his preference as to the scheduling of his testimony.

Through his Motion, Judge Richardson, a General Sessions Court Judge for Giles County, Tennessee, argues that his subpoena should be quashed because it subjects him to an undue hardship; he was previously deposed in this case; and he is immune to the subpoena pursuant to Tennessee Code Annotated Section 24-9-101(3).

[2] Judge Parkes' argument that the subpoena does not allow a reasonable time to comply has become moot with the resetting of the preliminary injunction hearing from November 27, 2018 to January 31, 2019.

Judge Richardson argues his appearance at the hearing will subject him to an undue hardship because the hearing is set for January 31, 2019, a Thursday, and he has a very heavy docket on Thursdays. As with Judge Parkes, the Court will specially set Judge Richardson's testimony to begin as late as 5:00 p.m. on January 31, 2019, or at any time on February 1, 2019. Judge Richardson may file a notice with the Court in advance of the hearing stating his preference as to the scheduling of his testimony.

Judge Richardson also argues the Court should quash the subpoena because Plaintiffs have already taken his deposition. Plaintiffs contend the live testimony of Judge Richardson is important to sustain their burden of proof, and point out that all the defendants have refused to enter into stipulations based on Judge Richardson's deposition testimony. Under these circumstances, and in the absence of cited authority that the existence of deposition testimony presents a basis for quashing a subpoena for live testimony, the Court is not persuaded by Judge Richardson's argument.

Finally, Judge Richardson argues he is immune from the federal subpoena based on Tennessee Code Annotated Section 24-9-101, which provides as follows:

> (a) Deponents exempt from subpoena to trial but subject to subpoena to a deposition are:
>
> (1) An officer of the United States;
>
> (2) An officer of this state;
>
> (3) *An officer of any court or municipality within the state*;
>
> (4) The clerk of any court of record other than that in which the suit is pending;
>
> (5) A member of the general assembly while in session, or clerk or officer thereof;
>
> (6) A practicing physician, physician assistant, advanced practice registered nurse, psychologist, senior psychological examiner, chiropractor, dentist or attorney;

> (7) A jailer or keeper of a public prison in any county other than that in which the suit is pending;
>
> (8) A custodian of medical records, if such custodian files a copy of the applicable records and an affidavit with the court and follows the procedures provided in title 68, chapter 11, part 4, for the production of hospital records pursuant to a subpoena duces tecum; and
>
> (9) A licensed clinical social worker, as defined in § 63-23-105 and engaged solely in independent clinical practice, in proceedings in which the department of children's services is the petitioner or intervening petitioner.
>
> (b) If the court grants a motion to quash a subpoena issued pursuant to subsection (a), the court may award the party subpoenaed its reasonable attorney's fees and expenses incurred in defending against the subpoena.

Plaintiffs argue this state statute cannot confer immunity on a state court judge with regard to a federal trial subpoena, and cite two cases to support that view. In *American National Property and Casualty Company v. Sutte*, 2015 WL 3994452 (E.D. Tenn. July 1, 2015), and *Hawkins v. Federated Department Stores, Inc.*, 2006 WL 6831303 (W.D. Tenn. Oct. 26, 2006), the courts rejected the view that this statute exempts Tennessee physicians, under Subsection (a)(6), from a federal trial subpoena.[3] Judge Richardson's Motion provides no basis to adopt a contrary opinion. *See, e.g., Hillsborough Cty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712, 105 S. Ct. 2371, 2375, 85 L. Ed. 2d 714 (1985) ("It is a familiar and well-established principle that the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that interfere with, or are contrary to, federal law."); *Hanna v. Plumer*, 380 U.S. 460, 473, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965) (Discussing the "long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules.")

[3] In *Gunter v. Bemis Co., Inc.*, 2016 WL 11248523, at *3 (M.D. Tenn. Apr. 20, 2016), the court noted reliance by one of the parties on this statute in arguing the issue of venue, but the court did not address the merits of the argument.

For the reasons set forth herein, the Motions to Quash (Doc. Nos. 158, 186) are **DENIED.**

It is so **ORDERED**.

WILLIAM L. CAMPBELL, JR.
UNITED STATES DISTRICT JUDGE