06 - BK - 052

James Ishida/DCA/AO/USCOURTS
02/15/2007 03:19 PM

To Gale Mitchell/DCA/AO/USCOURTS@USCOURTS, Jennifer Noell/DCA/AO/USCOURTS@USCOURTS
cc
bcc
Subject Fw: Proposed Amendments to the Federal Rules

The State Bar of Ca Committee on Federal Court's BK, CR, and EV comments.
----- Forwarded by James Ishida/DCA/AO/USCOURTS on 02/15/2007 03:19 PM -----

"Bercovitch, Saul" <Saul.Bercovitch@calbar.ca.gov>
02/15/2007 03:14 PM

To <Rules_Comments@ao.uscourts.gov>
cc
Subject Proposed Amendments to the Federal Rules

Dear Mr. McCabe:

I have attached comments of the State Bar of California's Committee on Federal Courts on the proposed amendments to the Federal Rules of Bankruptcy Procedure, Federal Rules of Criminal Procedure, and Federal Rules of Evidence. Please note that the position expressed in the comments is only that of the State Bar of California's Committee on Federal Courts. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Thank you.

Very truly yours,

06 - EV - 06

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THE STATE BAR OF CALIFORNIA

— COMMITTEE ON FEDERAL COURTS

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February 15, 2007

Via E-mail

Rules_Comments@ao.uscourts.gov

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules

Dear Mr. McCabe:

The State Bar of California's Committee on Federal Courts ("Committee") has reviewed the proposed amendments to the Federal Rules of Bankruptcy Procedure, Federal Rules of Criminal Procedure, and Federal Rules of Evidence. The Committee appreciates the opportunity to submit these comments. By way of background, the Committee is comprised of attorneys throughout the State of California who specialize in federal court practice and volunteer their time and expertise to analyze and comment upon matters that have an impact on federal court practice in California. The Committee consists of a broad range of federal practitioners, including members with civil, criminal, bankruptcy, and appellate experience.

I. FEDERAL RULES OF BANKRUPTCY PROCEDURE

A. Rule 2015.3

Proposed Rule 2015.3 provides that in a Chapter 11 case, a trustee or debtor-in-possession must file periodic financial reports regarding non-publicly traded companies in which the debtor owns a substantial or controlling interest. Subdivision (b) of the rule provides that the first such report must be filed not later than 5 days before the first date set for the meeting of creditors under Bankruptcy Code section 341. Subdivision (e) of proposed Rule 2015.3 provides that no later than 20 days prior to filing the report, the debtor-in-possession or trustee must send a notice to various entities that it intends to file and serve the report. Rule 2003(a) provides that the first meeting of creditors under Bankruptcy Code section 341 shall be held not fewer than 20 and not more than 40 days after the order for relief.

The Committee believes that as written, proposed Rule 2015.3 will be impossible to comply with under certain circumstances. If the first meeting of creditors under Bankruptcy Code section 341 is scheduled between 20 and 25 days after the order for relief, the deadline for

serving the notice under subdivision (e) of proposed Rule 2015.3 will be *before* the bankruptcy case was filed.

The notice period should be shortened so that it fits within the 20-day time period set by Rule 2003 for holding the first meeting of creditors under Bankruptcy Code section 341.

B. Rule 3002

Proposed Rule 3002(c)(6) provides:

> "If notice of the time to file a proof of claim has been mailed to a creditor at a foreign address, on motion filed by the creditor before or after the expiration of the time, the court may extend the time by not more than 60 days if the court finds that the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."

The Committee observes that most bar date issues arise when a creditor learns of the bar date after it has expired. The proposed rule is not practical because, in most circumstances, it would be easier to file a proof of claim before the claims bar date than to file a motion to extend the claims bar date. Moreover, if a creditor has not been given "a reasonable time to file a proof of claim" it would raise issues of constitutional due process. The Committee believes the proposed rule limiting the time within which a creditor can seek to extend the bar date, and limiting the amount of the extension to 60 days even where a court finds that notice was insufficient, might be unconstitutional under current case law.

C. Rule 4003

Proposed Rule 4003(b)(1) provides that, except as provided in subdivisions (b)(2) and (b)(3), an objection to a claim of exemption must be filed within 60 days after the meeting of creditors held pursuant to section 341. Subdivision (b)(2) provides that a trustee may file an objection to a claim of exemption at anytime prior to one year after the closing of the case if the debtor fraudulently asserted the claim of exemption. Subdivision (b)(3) provides that an objection to a claim of exemption based on section 522(q) shall be filed prior to the closing of the case. Presumably, exemptions based on section 522(q) can be made fraudulently. Therefore, the Committee believes that subdivision (b)(3) should be subject to subdivision (b)(2).

D. Rule 5008.

This proposed rule deals with notice regarding a late statement of presumption of abuse under the recently enacted amendments to the Bankruptcy Code.

The Committee has a concern that it would be an extreme burden on the court to send out an additional notice if/when the debtor provides a "late statement of presumption of abuse" or "second statement triggering a presumption of abuse." Courts usually send out a notice for the

341(a) meeting of creditors, which includes the presumption of abuse along with other important deadlines. To impose an additional responsibility of *another* separate notice is expensive, difficult, burdensome and may procedurally "slip through the cracks."

The Committee believes this requirement should rest with the debtor and/or debtor's counsel since they are responsible for the late statement. Another alternative is to address this change in presumption either at the 341(a) meeting of creditors, or on the ECF docket with a separate and distinct entry. Most if not all creditors have access to ECF nationwide and can monitor each case and receive special notice or "e-notice" upon the filing of the new presumptive of abuse statement. Imposing the notice on the courts seems un-necessary.

To summarize, the Committee believes that responsibility of notice of any change in presumption should be with either the debtor or the monitoring creditor, not the court.

E. Rule 6011

This proposed rule deals with the protection of patient documents in a bankruptcy case involving large medical business cases.

The cost of noticing interested parties of destruction of patient records in large medical business cases can be very expensive, especially where patients may be scattered across the country. The Committee believes that special mention should be made in this rule directing the cost of the noticing not to factor into whether the notice is actually sent and that, should there be insufficient funds in the estate to cover the cost of the notice, the cost will be borne by the U.S. Trustee's or Bankruptcy Court Clerk's Office.

II. FEDERAL RULES OF CRIMINAL PROCEDURE

A. Proposed amendments implementing the Crime Victims' Rights Act

1. Rule 1. Scope; Definitions

The Committee opposes the proposed amendment to Rule 1(b) as presently constructed. It defines the term "crime victim" that is found in the Crime Victims' Rights Act ("CVRA"), codified as 18 U.S.C. § 3771(e). The proposed rule expands the definition provided in the statute by adding a second sentence stating: "A person accused of an offense is not a victim of that offense." The Committee's concern is that there are instances where those accused of crimes may also be victims of crimes in the same prosecution, such as cases involving alien smuggling or involuntary servitude. The victims of these crimes often share some degree of culpability in the overall criminal scheme. Additionally they may face charges of illegal entry into the United States or other crimes associated with the case. In such instances, the usual categorization or labeling of victim and defendant may not apply. The Committee would withdraw its opposition to this proposed amendment and remain neutral if the second sentence of the proposed rule were deleted.

2. Rule 12.1. Notice of an Alibi Defense.

The Committee is split on the implementation of the proposed amendment to Rule 12.1(b). Existing Rule 12.1(b) provides that if the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney the names, addresses, and telephone numbers of all witnesses, including the victims, the government intends to rely on at trial in order to refute the defendant's alibi. The proposed amendment requires the defendant in pretrial proceedings to establish and demonstrate a need to know the victims' names, addresses, and telephone numbers, and then prepare a motion to the court to order the government to provide the information. The court, in its discretion, may then either order the release of the information by the government to the defense, or fashion a reasonable procedure to allow the preparation of the defense and also protect the victims' interests.

Some Committee members oppose the proposed amendment. The CVRA does not require the proposed procedure for obtaining victim/witness identification and access to data. The proposed amendment would impose an undue burden of the district court because of the increased number of motions to be calendared, read, and heard. It might necessitate *in camera* reviews and evidentiary hearing in cases where the defendant raises an alibi defense. The proposed amendment would require defendants to reveal defense investigation and strategies at an earlier stage than currently required. Rather than placing the burden on the defendant to establish the need and on the court to determine the validity of that need, these Committee members believe the Advisory Committee should assume that a defendant will need victim information to respond to the government's challenge to his or her alibi, and that disclosure should be limited only when a special need for the protection of the victim requires the court to fashion some other procedure to allow the preparation of the defense. The burden should be on the victim to establish the need for protection of the victim.

Other Committee members support the proposed amendment. These members see the proposed amendment as the codification of a procedure already used by federal prosecutors, and believe it would assist prosecutors in avoiding potential liability for possible harm to victims. These Committee members believe that defense counsel may establish their need for victim data in an ex parte hearing, without interference by the prosecutor. Committee members who favor the proposal point out that the CVRA entitles the victim and the victim's representative to be present at all court hearings. But it is unlikely that the government attorneys would voluntarily stay away from a proceeding where the victim and the defendant were present.

3. Rule 17. Subpoena.

The Committee is split on the implementation of the proposed amendment to Rule 17, which establishes a requirement that defendants must acquire judicial approval and an order for every subpoena to a third party that seeks documentary information about a victim. The purpose of the proposed amendment to Rule 17 is to address and provide "respect for the victim's dignity and privacy." 18 U.S.C. 3771 § (a)(8).

The concern of some Committee members is the onerous burden on the defendant and the district court in holding yet another hearing and prolonging the resolution of the case. Every request for subpoena adds another layer of litigation to a case. The proposal potentially impairs the right of defendants to exercise their subpoena power. It impinges upon the ability of the defense to challenge the veracity of witnesses/victims. The proposed amendment does not define what material is "personal" or "confidential" and thus is overbroad. These Committee members believe that the victim's privacy would be protected by requiring the court, once the subpoena has been stamped in the clerk's office, to notify the victim who may then move to quash.

Other Committee members believe the benefit of avoiding unjustified harassment of victims outweighs the burden on the court and the defendant.

4. Rule 18. Place of Prosecution and Trial

The Committee is opposed to implementing the proposed amendment to Rule 18, which currently provides that the district court must consider the convenience of the defendant, the witnesses, and the prompt administration of justice when selecting the proper place for trial. The proposed amendment adds "any victim" to the list of considerations. The proposed amendment is not limited to *testifying* victims.

The purpose of the proposed amendment is to implement a victim's right to attend proceedings under the CVRA. The Committee believes that implementation of this proposed amendment would be extremely difficult in complex cases or cases with many non-testifying victims, such as Ponzi schemes. This proposal is an overbroad reaction to 18 U.S.C § 3771(b), which does not require that venue be dictated for the convenience of the victims or their representatives. Rather, the statute requires that the court ensure that the victim is afforded the right to reasonable, accurate, and timely notice of the criminal proceedings, the right not be excluded from such proceedings absent clear and convincing evidence that testimony by the victim would be materially altered if the victim heard other testimony at the proceeding, and the right to be reasonably heard at the proceedings. 18 U.S.C § 3771(a). The Committee is concerned that the proposed change may result in burdensome and unnecessary litigation.

5. Rule 32. Sentencing and Judgment

The Committee opposes the proposed amendments to Rule 32, which it believes are problematic.

The Committee opposes the proposed changes to Rule 32(d)(2)(B) that delete the requirement of the current rule that the presentence report consists of verified information presented in a nonargumentative style. The purpose of the presentence report is to present an objective picture to the court in order to assist the court in determining a fair and just sentence. Eliminating the need to verify the input to the report raises the likelihood that defendants will exercise their rights to trials at sentencing to avoid the prospect of having their sentences increased by unproven and unverified evidence presented under less than a "beyond a reasonable doubt" standard.

The Committee opposes the changes to Rule 32(i)(4)(B). The practical effect of the proposed amendment is likely to increase the time for sentencing hearings and allow the court to consider unverified, unsworn, unchallenged statements that can adversely affect a defendant's sentence or undermine a plea agreement. It is far better for the victim and/or his or her representative to submit a written statement in advance, to be included with the presentence report so that the probation officer can provide the statement to both the defense and government attorneys to give notice of what is to be said. The risk of opening up a forum to victims who are not sworn under the penalty of perjury is a violation of *Apprendi* that any fact that raises a sentence beyond the statutory maximum must be proven to a jury beyond a reasonable doubt.

6. Rule 60. Victim's Rights.

The Committee generally opposes this proposed rule, as it is primarily a restatement of the CVRA that, in part, either expands or limits the provisions of 18 U.S.C. § 3771. However, the Committee believes that modifications to subdivisions (b)(1), (b)(4) and (b)(5) may resolve the problems.

Subdivisions (a)(2) and (a)(3) are consistent with the statute, but seem redundant.

Subdivision (b)(1) does not contain a time limit for the court to rule on motions asserting a victim's rights. The proposed subdivision says a court must decide "promptly" and the statute says "forthwith." However, the statute also provides that proceedings shall not be stayed or continued for "more than five days for purposes of enforcing this chapter." Because the statute is vague about whether this time limitation only applies to the filing of a writ to the appellate court or includes the filing of a motion to the district court, the rule should include the reference to the five days and clarify whether and how it affects a motion to the district court. As the appellate court has 72 hours to act on a writ, it appears that the district court may only have two days to act on the preceding motion.

Subdivision (b)(2) provides that the rights of a victim may be asserted by the victim or the attorney for the government. Pursuant 18 U.S.C. § 3771(d)(1), the proposed rule should add "or the victim's lawful representative."

Subdivision (b)(3) is generally consistent with the statute, but seems redundant.

Subdivision (b)(4), which determines where a victim's rights must be asserted, omits the statutory language providing: "or, if no prosecution is underway, in the district court in the district in which the crime occurred." For the sake of consistency, this language should be included in the proposed rule.

Subdivision (b)(5)(B) includes the following language: "of the denial and the writ is granted." That language is not in the statute. For the sake of consistency, the language should be deleted.

Subdivision (b)(6) is consistent with the statute, but seems redundant.

B. Other proposed amendments

1. Rule 29. Motion for a Judgment of Acquittal.

The proposed amendment to Rule 29 eliminates the current ability of the district court to grant a pre-verdict acquittal that is not appealable because of the constitutional prohibition against double jeopardy. The Advisory Committee split 6-5 on this amendment. The current amendment allows pre-verdict acquittals only where defendants waive their rights under the Double Jeopardy Clause. This amendment restricts the trial court's authority. This amendment was proposed by the U.S. Department of Justice at the January 2005 meeting of the Standing Committee on Rules of Practice and Procedure where it presented information about the frequency of pre-verdict acquittals and case studies of allegedly erroneous and unreviewable acquittals. The narrow Advisory Committee vote demonstrates the Advisory Committee's own reservations about the proposed amendment.

The Committee is split with respect to this proposed amendment. Some Committee members oppose the adoption and implementation of the proposed amendment, subscribing to the views of Williams & Connolly LLP, Hon. James F. Holderman, Peter Goldberger, Esq., Douglas Young, Terence P. Noonan, Esq., the Bar Association of San Francisco and others so inclined, and join their arguments accordingly.

Other Committee members adhere to the position promulgated by the Department of Justice that it is highly desirable for the government to be permitted to appeal erroneous acquittals. These Committee members believe that a defendant who does not wish to waive his constitutional rights can simply choose to wait for a ruling on a Rule 29 motion until after the jury returns a verdict. This insures the government has adequate recourse to appeal any adverse decision while not impinging upon a defendant's constitutional rights.

2. Rule 41. Search and Seizure

The Committee has no opposition to the proposed amendment to Rule 41.

III. FEDERAL RULES OF EVIDENCE

Proposed Federal Rule of Evidence 502(a) provides:

> "(a) Scope of waiver. — In federal proceedings, the waiver by disclosure of an attorney-client privilege or work product protection extends to an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information."

The Committee submits that this rule is unnecessary, contrary to the current state of the law, and would encourage "gaming" of the discovery process to the receiving party's unfair disadvantage.

As written, this proposed rule would allow selective intentional waiver of attorney-client privileged material. Under this new standard, a disclosing party would be free to produce a privileged document without fear of the consequence that additional information and/or documents must also be produced under the current subject matter waiver rules. This result would provide the disclosing party an unfair advantage of producing and relying on a privileged document, while at the same time hiding behind the privilege and thus preventing the receiving party from conducting discovery on related matter that might neutralize and/or negate altogether the argument advanced by the producing party through use of that document.

The proposed rule does contain a "fairness" provision, which appears to be intended to address the concern expressed above. However, this language is so vague and subject to interpretation that, in this Committee's opinion, it will only serve to invite litigation and encourage motion practice rather than solve the problem. Although the "ought in fairness" language is taken from Rule 106, situations involving that rule differ in one significant respect from situations that would be covered by proposed Rule 502(a). In the context of Rule 106, the party arguing in favor of the introduction into evidence of the remainder of a writing or recorded statement will generally have the material that has not yet been introduced, and the "fairness" argument is based on the actual content of the introduced and unintroduced portions. Under proposed Rule 502(a), in contrast, because the undisclosed communication or information concerning the same subject matter is not available to the receiving party, it will be difficult for that party to make a showing that this undisclosed information ought in fairness to be produced. In the experience of the members of the Committee, privilege logs typically do not contain information sufficient to make the fairness showing that would be required under the proposed rule. The Committee's position is that the current subject matter waiver rules operate fairly for both producing and receiving parties, and that there is no need to change the current standard.

Disclaimer

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overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

/s/

Joseph E. Addiego III, Chair
The State Bar of California
Committee on Federal Courts