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SUPREME COURT



04-CV-088
04-BK-006
04-EV-005

4 January 2005

The Hon. 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:Preliminary Draft of Proposed Amendments to the
Federal Rules of Practice and Procedure
August, 2004; Public Comments Due February 15, 2005

Dear Mr. McCabe:

I am pleased to once again avail myself of the opportunity to make some small comments regarding the proposed changes to the Federal Rules as referenced above. For sake of economy, I have consolidated my comments on the various substantive bodies in this one letter.

Bankruptcy Rule 4002

The proposed amendment to Federal Rule of Bankruptcy Procedure 4002 addresses a problem long known to the bankruptcy bench and bar, which has been an unending source of bedevilment, frustration, and, in truth, much inefficiency and injustice, and one long in need of remediation. And to think such a necessary change, while it may not solve the problem entirely, is attained via the simple expedient of some straightforward language.

At one end of the spectrum, there is the honest but underinformed debtor who simply does not know enough (and is not told by counsel----another issue for another day!) to bring such basic identification and documentation to the Section 341 meeting, an event whose value to the trustee and the creditors is often underestimated by the less knowledgeable. By having a plainly stated Rule, as now proposed, it makes it far more likely that debtors will come better prepared to the meeting of creditors, and concomitantly, more will be accomplished, and bankruptcy administration will be better served.

Yet one must note the polar opposite, the less than honest debtor that has filed a case to evade and frustrate lawful creditors. Such unscrupulous characters will conveniently "forget" to bring such fundamental papers to the meeting of creditors, thus

compelling adjournments and wasted time. This is not by accident; it is, sad to say, by design, a willful act to keep creditors at bay and intended to have them tire of the chase.

If adopted as proposed, an amended Rule 4002 will in large part forcibly stamp out such abuses. It will discourage frivolous delays by underhanded debtors, and will curtail manipulation of the 341 meeting and the early stages of the bankruptcy process. Lastly, it will help greatly in sorting out the wheat from the chaff among the body of newly filed debtors, a goal long intended by the mechanism of the statutory first meeting of the creditors and trustee. Moreover, in doing all this, it will not delimit, but only clarify, one of the debtor's several solemn duties to cooperate with the trustee. Therefore, I strongly support the proposed amendment to Bankruptcy Rule 4002

Civil Rules on Electronic Discovery

I respectfully address as a whole the proposed changes to the Federal Rules of Civil Procedure regarding the accommodation of electronic discovery. The subject is too vast for my own humble analysis, which would be moot anyway, given the tremendous resources already expended by the learned Committee and its associates on this critical topic.

Suffice to say, the proposed changes no doubt represent the necessary initial steps to bring the evolving sphere of electronic data within the universe of discovery contemplated by the Federal Rules. I state "initial" with respect, for as I am sure others will agree, we are only at the beginning of an era where traditional "paper" discovery is being supplanted, if not outright replaced, by new technology.

Given that, the Committee's proposals are to be lauded for making substantive changes that comprehensively open up the Civil Rules to provide for electronic discovery, to preserve evidence that might be in electronic form, and clarify the equally important point that the hallowed attorney client privilege will not be compromised by accidental disclosure buried within masses of electronic bits and bytes.

As a federal litigator, that last point bears some importance to me. As so clearly exposited by the Commitee's explanatory notes, the vastness of electronic data makes it extraordinarily difficult for even an army of litigators to be absolutely assured that some privileged item does not slip through their fingers. For the small or solo federal practitioner, which I proudly count myself as, limited resources make the task virtually impossible. Therefore, it is comforting and in fact necessary that the proposal carves out a "safe harbor" preserving the privilege in the event (if not the likelihood) of an inadvertent disclosure of an otherwise privileged piece of electronic data.

The proposed amendments to the Civil Rules will provide a solid foundation as we move into the future of electronic discovery. No doubt changing technology will require further refinement. It is undeniable that the new Information Age has already outstripped our traditional legal process. We shall most likely always be playing "catch up." Nonetheless, changes such as these will insure that the law stays close behind technology, and our system of law shall remain vital and relevant in a changing world. In sum, the proposed Rule changes deserve full support.

Federal Rule of Evidence 408

I have saved for last my most vital comments, and my most ardent praise, for the proposed changes to Federal Rule of Evidence 408.

The Committee has exquisitely set forth the paramount public policy goal behind Rule 408; to foster, promote, and *protect* settlement discussions between parties. Now, more than ever, with already overburdened federal courts and a continuing expansion of the federal docket, the efficacy of settling cases in advance of trial has never been more important. For decades, Rule 408 has been the linchpin of the stated and virtuous policy of encouraging settlement, by assuring parties of an almost unbreakable guarantee that anything put forth in negotiations cannot be used against them at a later date. Such confidentiality not only protects compromise, it is the *essence* of compromise talks that actually lead to settlement.

Regarding the Committee Note, I refrain from commenting on the first stated reason for the proposed change, that being to clarify the availability of statements made in compromise in a criminal matter, as that aspect is beyond my experience.

However, I do observe that the learned Committee hits the mark when declaring an amendment is necessary to make clear that statements made in compromise cannot and should not be used to impeach via prior inconsistent statement or through contradiction. The opportunities for mischief and sharp practice abound when statements made under the cloak of Rule 408 are turned around to the speaker's detriment. The Committee's explanatory letter speaks of a "chilling effect" if such protections could be subverted. As an active practitioner, I can assure the Committee that the "chill" would be more of an Arctic deep freeze, bitterly cold and bleak. At a minimum, the sought after candor so imperative for settlement discussions has suffered and will continue to suffer greatly until this clarification is made.

In similar fashion, the Committee is once again on target by seeking amendment to prohibit a unilateral disclosure of statements made in compromise. First, consider that in the "fog of litigation," it is quite difficult, if not impossible, to limit disclosure solely to what Party A said in compromise. Statements made by Party A oft times make no sense if taken in isolation, and this could lead to dangerous speculation by a finder of fact as to what Party B said originally or in reply to the now public compromise statements of Party A. This is insidious disclosure, in full or part, of what Party B said in the good faith pursuit of settlement, with an expectation of privacy.

Next, please consider the larger stage upon which this Rule plays. Litigation is all about advantage. If Party A wishes to unilaterally disclose what it said in settlement talks, how much honest advantage is in that? Contrast the well intended disclosure with a less scrupulous attempt to disadvantage the adversary by treading along the line of confidentiality, if not brazenly stepping across that boundary to extract or imply statements made in confidence, all intended for the maximum disadvantage of the opponent. While I am not a mind reader, nor an expert in human psychology, I am hard pressed to imagine a scenario where a litigant, by unilaterally disclosed supposedly its own compromise statements, was not seeking to pervert Rule 408 to ends not contemplated.

Without resorting to anecdotes, I will state for the Committee's benefit that my own experience in our federal courts has repeatedly and unequivocally demonstrated time and again that Rule 408 is one of the most valuable of our Federal Civil Rules, its crucial policies and goals must be honored both in letter and in spirit, and any ambiguities must be resolved in favor of strongly preserving the confidentiality bestowed by the Rule, while minimizing any potentially harmful exceptions. In conclusion, the Committee's proposed changes are well reasoned, valuable, and necessary.

In closing, I thank the learned Committee for this opportunity to comment, and I trust my few comments have been of some value. Thank you, and I remain,

Very truly yours,

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