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02/15/2005 12:51 PM

To <Rules_Comments@ao.uscourts.gov>
cc
bcc
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 Appellate, Bankruptcy, and Civil Procedure, and the 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,

Saul Bercovitch

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THE STATE BAR OF CALIFORNIA

— COMMITTEE ON FEDERAL COURTS

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February 15, 2005

Via E-mail and U.S. Mail

Rules_Comments@ao.uscourts.gov

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules

Dear Mr. McCabe:

The State Bar of California's Committee on Federal Courts ("Committee") has reviewed and analyzed the proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the 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, immigration, and appellate experience.

I. FEDERAL RULES OF CIVIL PROCEDURE

A. Rule 5 – Service and Filing of Pleadings and Other Papers

The Committee supports the proposed amendment to Rule 5(e), which authorizes courts to require by local rule that papers be filed electronically. The Committee believes electronic filing is an efficient and cost-effective method of filing documents. The Committee also believes, however, that accommodations should be made for parties who may have difficulty complying with an electronic filing requirement, including economically disadvantaged and incarcerated parties. The proposed Committee Note recognizes this potential problem and comes close to mandating that courts make appropriate exceptions to electronic filing requirements, by stating: "Courts requiring electronic filing recognize the need to make exceptions for parties who cannot easily file by electronic means, and often recognize the advantage of more general 'good cause' exceptions. Experience with these local practices will facilitate gradual convergence on uniform exceptions, whether in local rules or an amended Rule 5(e)." The

Committee believes this statement should remain in the Committee Note to acknowledge this issue explicitly.

The transmittal memorandum that accompanies the proposed amendment regarding electronic filing also notes that concern has been expressed about whether required electronic filing would be construed as consent to electronic service under Rule 5(b)(2)(D), but concludes this is not a problem in practice because all courts that have required electronic filing to date have provided an "opt out" for those not wishing electronic service. The Committee agrees with this conclusion, and believes those "opt out" options should remain.

B. Rule 16 – Pretrial Conferences; Scheduling; Management

The Committee supports the proposed amendments to Rule 16. The Committee views the proposed amendments as non-controversial, as they simply insert language concerning two provisions that might be included in a scheduling order: a) provisions for disclosure or discovery of electronically stored information, and b) the parties' agreement for protection against waiving privilege during discovery.

C. Rule 26- General Provisions Governing Discovery; Duty of Disclosure

1. Rule 26(b)(2)

The Committee is split on the proposed amendment to Rule 26(b)(2), with the majority in favor and the minority opposed.

The proposed amendment sets up a procedure to address electronic discovery. The amendment is designed to address the unique features of electronically stored information, such as its volume, the variety of locations where it might be found, and the difficulty of locating, retrieving and producing electronically stored information. Under the proposed amendment a party need not produce electronically stored information that the party identifies as not "reasonably accessible." On motion by the requesting party, the responding party must demonstrate that the information is not reasonably accessible. If that showing is made, the court may still order the party to provide the information if the requesting party demonstrates good cause, and the court may specify the terms and conditions for such discovery.

The majority of the Committee believes the proposed amendment is an appropriate way to deal with the distinctive features of electronically stored information. The majority also believes the proposed Committee Note gives sufficient definition to the term "reasonably accessible," that the term will vary, depending on the circumstances of a particular case, and that case law may better define the standard that would ultimately be established. The majority of the Committee believes the proposed Committee Note provides sufficient guidance to litigants, lawyers and judges in determining whether good cause exists to order the discovery of electronic information that is not reasonably accessible, and adequately addresses terms and conditions that a court might impose in ordering electronic discovery.

A minority of the Committee opposes the proposed amendment to Rule 26(b)(2), and has serious reservations about the effect of the proposal on the conduct of discovery, as well as its possible overall effect on the inclination of parties to settle.

The proposed rule change affects the burden of proof of showing the reasonableness of the discovery request, basically shifting it to the requesting party. The burden has always been on the responding party to show that the requested information is not readily obtainable. The minority of the Committee questions why the burden should be shifted, when such a shift could cause even more "stonewalling" on the part of responding parties who may be entities with financial resources superior to the requesting party. The change might lead to an increase in discovery motions as the responding party can very easily, as a matter of course in every request, call for the requesting party to prove reasonableness. Even where there is good faith on behalf of both requesting and responding parties, it is often difficult for a requesting party to fashion a request that does not arguably impose an unreasonable burden on the responding party, absent specific knowledge of the responding party's computer storage systems and procedures to guide the drafting of the request.

The minority of the Committee notes that one possible remedy to this situation would be to call for an automatic exchange of this technical information by both parties at a case management conference before discovery commences. But this may not be an adequate procedure in hotly contested cases. For litigants who may not be proceeding in good faith, the proposed rule seems to provide responding parties with an incentive not to respond as a litigation tactic, thereby adding expense to the requesting party's litigation costs, prolonging the proceedings, and delaying the exchange of information.

The potential increase in "stonewalling" tactics under the proposed amendment may have the overall effect of making discovery more difficult. This could thwart one goal of discovery, *i.e.*, to allow the court and each party to ascertain the facts, by providing each party with information prior to trial that may encourage settlement. If one party can more easily refuse to disclose information about the weaknesses of its case, that party will be less inclined to settle, thus resulting in more lengthy and costly litigation. For all of these reasons, a minority of the Committee opposes the proposed amendment.

2. **Rule 26(b)(5)**

The Committee generally supports proposed Rule 26(b)(5)(B), which sets up a procedure to address and remedy an inadvertent waiver of privilege, but suggests certain modifications to the proposal.

Proposed Rule 26(b)(5)(B) would apply to all discovery, but the impetus for the proposal lies in the recognition that, with the great volume of electronically stored information that is responsive to discovery requests, review of such data for privileged information can be very costly and time-consuming. Thus, under proposed Rule 26(b)(5)(B), if a party inadvertently produces privileged information without intending to waive a claim of privilege, that party may

notify the receiving party, within a reasonable time after production, that it is asserting a privilege. After such notice, the party receiving the privileged information would be required to promptly return, sequester or destroy the specified information and any copies, and may not disclose it to third parties. The producing party must preserve the information and put it on a privilege log (in compliance with Rule 26(b)(5)(A)), pending the court's ruling on a motion to compel as to whether the information is, in fact, privileged and whether any privilege has been waived by production.

The Committee considered arguments in support of, and against, the proposed process, including the views of some who may believe the proposed amendment would invite abuse by litigants who might assert "inadvertent waiver of privilege" for strategic reasons, after initially intending to produce the information in question. The Committee also weighed the fact that at least some California state courts call for a finding of an "intent to disclose" by the producing party in order for a court to find an effective waiver of a privilege. *See generally State Compensation Ins. Fund v. WPS, Inc.*, 70 Cal. App.4th 644, 652-54 (1999) (holding that inadvertent production of privileged materials does not waive the attorney-client privilege and inquiring whether the client intended to disclose such materials); *see also* ABA Formal Ethics Opinion 92-368 (Nov. 10, 1992) (stating that if an attorney receives clearly privileged materials, the attorney must notify the producing attorney and comply with the latter's instructions as to their disposition). The Committee believes that the important policies underlying the attorney-client privilege, attorney work product doctrine, and other privileges would be best furthered by the proposed Rule 26(b)(5)(B), by encouraging litigants to produce electronically stored information and other information that may be voluminous, without undue cost and delay, yet allowing litigants who did not intend to waive a privilege an opportunity to cure any such mistakes, so long as such curative actions are taken within a reasonable time.

The proposed Rule and accompanying Committee Note do not prescribe a particular form of notice. The Committee recommends that the party who claims the inadvertent production be required to provide notice to other parties in writing, to the extent practicable, in order to minimize any disputes later regarding whether a party actually provided notice or not. (A qualifier such as "to the extent practicable" recognizes that, in certain situations, a party may be able to provide informal or oral notice first, which nonetheless should be followed up with written notice.)

Additionally, the Committee supports the suggestion from some quarters that the proposed Rule should require a party who has received notice that privileged material has been produced to certify that the material has been sequestered or destroyed if it is not returned. While receiving parties cannot "erase" from their minds any inadvertently-produced privileged information they might have reviewed, nonetheless, certification – under penalty of perjury – that the privileged material has been sequestered or destroyed would help maximize protection of the privilege in situations where privileged information has already been inadvertently produced.

D. Rule 33 – Interrogatories to Parties

The Committee supports the proposed amendment to Rule 33(d), which clarifies that an answer to an interrogatory involving review of business records should a) involve a search of electronically stored information, and b) permit the responding party to answer by providing access to that information. Similar to the current option to produce hard-copy or paper business records in response to interrogatories, proposed Rule 33(d) allows a responding party to substitute access to electronically stored information as a response only if the burden of deriving the answer will be "substantially the same" for either party. If a party responds to an interrogatory in this manner, the party must ensure that the propounding party is able to locate and identify information as readily as the responding party; further, the responding party must give the propounding party a "reasonable opportunity to examine, audit or inspect" the information.

In general, the Committee favors the inclusion of electronically stored information as information that should be subject to the Rule 33(d) option of access. The primary issue of concern is that providing an adversary access to electronically stored information may be more complex than providing such access to hard-copy business records; thus, special considerations may need to be taken into account to ensure that a propounding party's burden of deriving an answer is, in fact, "substantially the same" as that which would have been borne by the responding party. The proposed Committee Note recognizes this issue by, for example, stating that satisfying the "substantially the same" burden requirement "may require the responding party to provide some combination of technical support, information on application software, access to the pertinent computer system, or other assistance." The key question, the proposed Committee Note states, is "whether such support enables the interrogating party to use the electronically stored information as readily as the responding party."

The Committee also considered any potential unfairness that may be visited upon litigants with limited financial resources, as a result of expanding Rule 33(d)'s option of access to apply to electronically stored information. After careful consideration, the Committee believes the proposed Committee Note provides sufficient guidance to the courts and to litigants to work to ensure that the Rule 33(d) option of access to electronically stored information is *only* made available to a responding party if the burden is truly "substantially the same" for both parties.

E. Rule 34 – Production of Documents, Electronically Stored Information, and Things

The Committee supports the proposed amendments to Rule 34.

The proposed amendment to Rule 34(a) clarifies that the scope of information that can be requested under Rule 34 includes electronically stored information, so that Rule 34's text reflects the manner in which many litigators have been actually using Rule 34 in practice for a number of years.

The proposed amendment to Rule 34(b) allows a requesting party to specify the form of production for electronically stored information. The amendment would allow the responding party to know with specificity what type of electronically stored information is requested and would also provide an opportunity to object before the inspection or provision of the electronically stored information is to take place. This seems to be a reasonable procedure in light of the current inspection process under Rule 34.

F. Rule 37 – Failure to Make Disclosure or Cooperate in Discovery; Sanctions

Proposed Rule 37(f) provides a "safe harbor" from sanctions under specified circumstances. Under the proposed formulation of Rule 37(f), unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions if the party took "reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action" and the failure to provide the information "resulted from loss of the information because of the routine operation of the party's electronic information system."

The Committee believes the availability of such a safe harbor is a sound idea. The proposed safe harbor provides necessary protection, and recognizes unique issues that result from a party's normal automated computer recycling, alteration, and overwriting procedures. In essence, the safe harbor would provide protection for a party who imposes a timely "litigation hold" to preserve electronically stored information.

The Committee recognizes the significance of an issue presented by the Advisory Committee: what level of *culpability* should preclude the protections of this safe harbor? Ultimately, the Committee determined that the standard that makes a party ineligible for the safe harbor should be negligence (a failure to take reasonable steps to preserve information), as in the Advisory Committee's main proposal.

The Committee believes the "alternative" standard set out in the Report of the Civil Rules Advisory Committee, pp.32 – 33, at footnote ** – which would preclude a court from imposing sanctions unless a party "intentionally or recklessly failed to preserve" the electronically stored information – would unduly restrict the court's discretion. Under the "alternative" standard set forth in footnote **, a court apparently would be precluded from imposing sanctions under Rule 37 upon a party for failing to provide electronically stored information, if the party acted negligently, that is, if it failed to take reasonable steps to preserve information that was later lost as a result of the electronic information system's routine operation. The Committee disagrees with this result; instead, it believes that whether a court chooses to impose – or not to impose – sanctions on a party who fails to take reasonable steps to preserve electronically stored information in a timely manner, should be the court's decision to make. The Committee recognizes that, as a factual matter, determining the precise level of culpability in any particular case will involve a highly specific inquiry that may involve many factors, including the sophistication of the computer system and the party, the type of information stored, the existence of preexisting legal requirements to preserve such information (such as in the securities area),

resources to enact preservation measures, and other considerations that courts may determine relevant. Even when sanctions are appropriate, a court would retain the discretion to fashion the severity of those sanctions, based upon the level of culpability shown to exist in any particular case.

G. Rule 45 - Subpoena

The proposed amendments to Rule 45 conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. The Committee therefore incorporates by reference its comments on the proposed amendments to Rules 26 and 34, above, as those comments apply equally to the proposed amendments to Rule 45.

Complying with a subpoena may impose burdens on the responding person, whether a party or a nonparty. As the proposed Committee Notes states, however, "[t]he Rule 45(c) protections should guard against undue imposition on nonparties." Because testing or sampling may present particular issues of burden or intrusion for the person served with a subpoena, the Committee believes the final Committee Note should state, as proposed, that "the protective provisions of Rule 45(c) should be enforced with vigilance when such demands are made."

H. Rule 50 – Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

The Committee supports the proposed amendments to Rule 50, which would eliminate procedural traps and would be beneficial to practitioners.

The first proposed amendment allows renewal after trial of any Rule 50(a) motion for judgment as a matter of law, thereby deleting the requirement that a motion made before the close of all the evidence must be renewed at the close of all the evidence. This would reflect the belief that a motion made during trial serves all the functional needs of a motion at the close of all the evidence, and address conflicting views by the courts which have produced an increasingly uncertain doctrine and practice, thereby inviting more appeals.

The second proposed amendment provides a time limit for renewing a motion for judgment as a matter of law after the jury has failed to return a verdict on an issue addressed by the motion. This would restore the 1991 deletion – and clarity – to the Rule.

II. FEDERAL RULES OF EVIDENCE

A. Rule 404 – Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

The Committee supports the proposed amendment to Rule 404(a), which clarifies that in a civil case evidence of a person's character is never admissible to prove conduct. The

amendment would also clarify that the admission of evidence concerning the character of an alleged victim in a criminal case involving sexual misconduct is subject to additional limitations set forth in Rule 412.

As noted in the proposed Committee Note, the use of character evidence carries serious risks of prejudice, confusion, and delay. Given these risks, the Committee believes the exceptions applicable to the use of character evidence in criminal cases should not be expanded to civil cases.

B. Rule 408 – Compromise and Offers to Compromise

The Committee supports the proposed amendment to Rule 408, which clarifies that statements and offers made in compromise negotiations would be barred even if offered to impeach a witness by way of contradiction or prior inconsistent statement, or even if offered by the party who made the statement or offer of compromise. The amendments would also clarify that an offer or acceptance of a civil settlement would be excluded from criminal cases, although any statements of fault made in the course of settlement negotiations would be admissible in a subsequent criminal case.

The proposed amendment would resolve a number of long-standing disputes concerning the scope of Rule 408 by eliminating a number of exceptions to the Rule that some courts have recognized. The Committee believes the elimination of such exceptions furthers the purpose of the Rule by promoting and facilitating settlements.

III. FEDERAL RULES OF BANKRUPTCY PROCEDURE

A. Rule 1009 – Amendments of Voluntary Petitions, Lists, Schedules and Statements

The Committee supports the proposed amendment to Rule 1009. Provisions for correcting an incorrect social security number seem necessary.

B. Rule 2002 – Notice to Creditors, Equity Security Holders, United States, and United States Trustee

The Committee supports the proposed amendment to Rule 2002, which authorizes entities and notice providers to agree on the manner and address to which service may be effected. The amendment does not invalidate other methods of proper service, but may simplify and assure that notice is provided in certain situations.

C. Rule 4002 – Duties of Debtor

The Committee supports the proposed amendment to Rule 4002, which requires the debtor to bring certain financial documentation to the section 341 meeting of creditors. The

Committee believes the required documentation will provide a clearer and more complete depiction of the debtor's financial condition.

D. Rule 5005 – Filing and Transmittal of Papers

1. Rule 5005(a)(2)

The Committee supports the proposed amendment to Rule 5005(a)(2), and incorporates by reference its comments on the proposed amendment to Rule 5 of the Federal Rules of Civil Procedure, above.

2. Rule 5005(c)

The Committee supports the proposed amendment to Rule 5005(c), which expands the scope of the Rule and provides that the clerk of the bankruptcy appellate panel and the district judge shall forward erroneously filed documents to their proper destination. This amendment would be helpful if a party files papers in the wrong place. The Committee agrees that the omission in the existing Rule should be corrected.

E. Rule 7004 – Process; Service of Summons, Complaint

The Committee supports the proposed amendment to Rule 7004, which requires that in adversary proceedings against a debtor, the debtor's attorney must also be served with the summons and complaint. This is often done in any event, and getting the attorney involved from the outset will probably speed up the adversary process.

F. Rule 9001 – General Definitions

The Committee supports the proposed amendment to Rule 9001, which would support the proposed amendment to Rule 2002, discussed above.

G. Rule 9036 – Notice by Electronic Transmission

The Committee supports the proposed amendment to Rule 9036, which eliminates the requirement to obtain confirmation that a party received an electronic notice. This would be very helpful because e-mail receipt confirmations are often not available, and confirmations are generally unnecessary as e-mail has become much more reliable in recent years.

H. Schedule I – Current Income of Individual Debtor(s)

The Committee supports the proposed amendment to Schedule I, which requires the disclosure of the current income of a non-filing spouse in a Chapter 7 case, as this information may be relevant to certain determinations.

IV. FEDERAL RULES OF APPELLATE PROCEDURE

A. Rule 25 – Filing and Service

The Committee supports the proposed amendment to Rule 25, and incorporates by reference its comments on the proposed amendment to Rule 5 of the Federal Rules of Civil Procedure, above.

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Very truly yours,

A. Marisa Chun, Chair
State Bar of California
Committee on Federal Courts

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bcc

Subject Comments on Federal Rules

Please find attached comments from the State Bar of California's Standing Committee on the Delivery of Legal Services on proposed amendments to Federal Rules regarding electronic filing.

Sharon Ngim
Program Developer and Staff Liaison to the
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Proposed Amendments to Federal Rules on e Filing 2005[1].doc

THE STATE BAR OF CALIFORNIA

OFFICE OF LEGAL SERVICES, ACCESS & FAIRNESS PROGRAMS

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February 15, 2005

Via E-mail to Rules_Comments@ao.uscourts.gov

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. McCabe:

The State Bar of California's Standing Committee on the Delivery of Legal Services (SCDLS) reviewed the proposed amendments to the Federal Rules, namely Appellate Rule 25(a), Bankruptcy Rule 50005(a) and Civil Rule 5(e), at its video conference meeting on February 5, 2005. We appreciate the opportunity and are pleased to offer our comments below. By way of background, SCDLS is 20 member committee comprised of California attorneys who are actively involved in the delivery of legal services to low-income, moderate-income and self-represented litigants in primarily civil areas including bankruptcy, family, immigration, housing, public benefits and consumer.

Appellate Rule 25(a), Bankruptcy Rule 5005(a) and Civil Rule 5(e)

SCDLS supports the proposed amendments to these three rules which authorize courts to require by local rule that papers be filed electronically, provided that exceptions are made for file by traditional means for: 1) pro se litigants who lack resources and/or the ability to comply, such as incarcerated individuals, and 2) attorneys who lack the technological resources to file papers electronically such as some legal aid attorneys and some pro bono attorneys. In addition, any electronic filing program implemented by the courts should offer sufficient technical support with a designated number for people to call to speak with knowledgeable and helpful staff to walk the pro se litigant or attorney through the e-filing process.

Should you have any questions, please do not hesitate to contact me at 415-538-2267 or sharon.ngim@calbar.ca.gov, or Tina Rasnow, Vice Chair and Legislation Subcommittee Chair for SCDLS at 805-654-3879 or tina.rasnow@mail.co.ventura.ca.us.

Thank you again for this opportunity to comment.

Disclaimer

This position is only that of the State Bar of California's Standing Committee on the Delivery of Legal Services. 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.

Sincerely,

Sharon Ngim

Sharon Ngim
Staff Liaison to the Standing Committee on the
Delivery of Legal Services