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04-CV-128

04-EV-008

Peter G. McCabe, Esquire
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. McCabe:

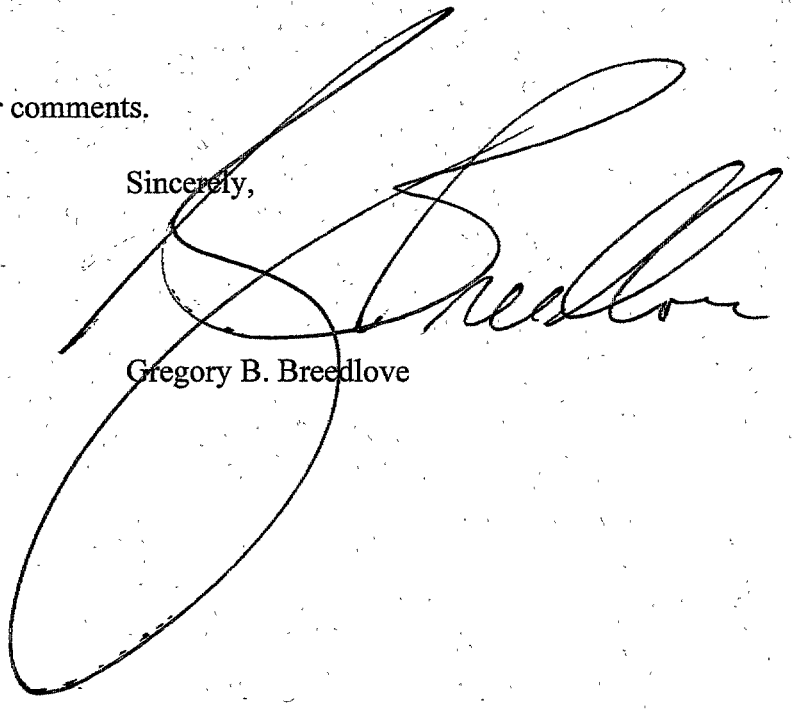
On behalf of all the lawyers in our firm, I am submitting the enclosed comments on the proposed amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

Based on our extensive civil trial practice, we strongly believe that several of these proposed amendments are ill-advised and would cause undesirable changes in the law. In particular, the amendment to Evidence Rule 408 allowing statements and conduct during civil settlement negotiations into evidence in a criminal case would undermine the civil courts' policy of favoring settlement; the amendment to Civil Procedure Rule 26 allowing a party subject to discovery requests to unilaterally declare or even render evidence "not reasonably accessible" would provide an improper incentive to spoliate evidence; the amendments to the Rules of Civil Procedure allowing a party to unilaterally change its mind about document production by retroactively asserting a privilege would circumvent the law that voluntary disclosure constitutes a waiver of privilege; the proposed amendment to Rule 37 minimizing the possibility of sanctions for destruction of electronically stored evidence would create an incentive for document destruction; and the proposed deletion from Rule 50 of a requirement for a JML motion at the close of all the evidence is illogical, is unnecessary, and would contravene the right of trial by jury.

We have confined our comments to the proposals to which we object, and we have tried to keep them short. We appreciate the difficult work these committees have engaged in, but we caution restraint as to the matters discussed in our comments.

Thank you for your attention to our comments.

Sincerely,



Gregory B. Breedlove

GBB/dmb
Enclosures

# COMMENTS ON PROPOSED AMENDMENTS TO FEDERAL RULES OF EVIDENCE

Submitted by Cunningham, Bounds, Yance, Crowder and Brown, L.L.C.
Mobile, Alabama

We, the undersigned practicing attorneys, submit the following comments in response to the August 2004 proposals to amend the Federal Rules of Evidence.

## Rule 408 - Compromise and Offers to Compromise

This amendment would allow into evidence in a criminal case "conduct or statements made in compromise negotiations regarding [a] claim." Proposed Rule 408(a)(2). Such conduct or statements would not be admissible "in a civil case," *id.*, but, by implication and by virtue of the committee comments, they would be admissible in a criminal case. As justification for this change, the advisory committee says essentially that the Justice Department wants to be able to use this kind of evidence. The Justice Department apparently takes the position that if a person makes an admission of a crime during negotiations in a civil case, that admission should be admissible in evidence in a criminal prosecution.

The damper that this rule could place on compromise and settlement is obvious. Although the proposed rule would retain the inadmissibility of any offers, acceptances, or payment of consideration in settlement of a claim (Rule 408(a)(1)), it would be hard to draw the line between such offers and "conduct or statements." If a plaintiff or a defendant might be subject to criminal prosecution for anything he or she says or does

during settlement negotiations, this new rule would have a tendency both to prevent such negotiations from taking place at all and to minimize their usefulness if they do occur, because the parties would be concerned that another participant in the negotiations might report these previously private discussions to a U.S. Attorney or other prosecuting authority.

This proposed change to the rules of evidence seems to undermine unnecessarily the policy of the civil courts to encourage settlement. Anything said during settlement negotiations has always been treated as being essentially privileged. This amendment would give a very powerful negotiating leverage to one party if the other party lets something slip that might be incriminating.

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# COMMENTS ON PROPOSED AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

Submitted by Cunningham, Bounds, Yance, Crowder and Brown, L.L.C.
Mobile, Alabama

We, the undersigned practicing attorneys, submit the following comments in response to the August 2004 proposals to amend the Federal Rules of Civil Procedure.

## Rule 16

We object to the proposed Rule 16(b)(6) regarding "agreement[s] for protection against waiving privilege" for the reasons argued below regarding the proposed amendment to Rule 26(b)(5).

## Rule 26

We object to the proposed amendment to Rule 26(b)(2) that would allow a party to withhold production of "electronically stored information that the party identifies as not reasonably accessible." This proposed rule invites abuse. First, a party can unilaterally declare that electronically stored information is "not reasonably accessible" and thereby circumvent the policy of the rules of full and fair disclosure of discoverable material. Second, this proposed rule would invite parties to render electronically stored information "not reasonably accessible." Third, the concept that electronically stored information may routinely be "not reasonably accessible" is outdated and skewed toward the view of those who would conceal the truth. In its ill-advised undermining of the principle of discovery, in its creation of a temptation to destroy evidence, and in its mistaken view of electronic storage, this proposed rule is ill-advised.

There are cases holding that a party cannot shelter information within inadequate storage and retrieval systems that have no business related purpose solely for the sake of hiding information to protect itself in a dispute. *Kozlowski v. Sears Roebuck & Company*, 73 F.R.D. 73 (D. Mass. 1976); *Avillan v. Digital Equipment Corp.*, 1994 WL 198771, *5 (S.D.N.Y. 1994) ("Such disorganization is not an excuse for non-production of relevant documents.") (citing *Kozlowski* and other cases). This principle illustrates the risk of allowing a party to unilaterally identify electronically stored information as not being reasonably accessible.

A further example of the mistake in allowing the non-production of self-declared "not reasonably accessible" evidence appears in the proposed Committee Note. On page 12 of the proposed civil rules amendment, there is a paragraph quoting the *Manual for Complex Litigation* (4th), § 11.446. That comment concerns the volume of data that can be stored electronically, emphasizing the "staggering" volume of such data by comparing it to the equivalent number of typewritten pages of plain text. This comment is beside the point, for at least two reasons. At this writing in early 2005, hard drives holding 100 gigabytes of data or more are common. More important, with sophisticated search capabilities, the size of the entire data set is less important than the question of the ease with which relevant information can be sorted from the irrelevant. Large electronic files or collections of files that can be readily transferred to portable media and searched for relevant information, or searched in place without unduly disrupting the party or person's business, cannot reasonably be said by the creating party to be "not reasonably

accessible." The speed and efficiency of retrieving and sorting relevant from irrelevant information is more important to the question of "reasonably accessible" than sheer size.

Next, we object to the proposed amendment to Rule 26(b)(5). This proposed rule would create a sweeping change in the law of privilege by creating a presumption that a producing party may unilaterally retract production simply by stating that it did not "intend[] to waive a claim of privilege." Under the proposed rule, such an assertion of lack of intent would, without more, require the receiving party to "promptly return, sequester, or destroy the specified information and any copies." In one fell swoop, this rule would create an entirely new presumption that disclosure does not waive a claim of privilege and would place a burden on a party receiving discovery to treat documents as being privileged despite the fact that they have been produced without objection. As the law now stands, disclosure waives a claim of privilege. See *Bassett v. Newton*, 658 So.2d 398, 401 (Ala. 1995) ("Voluntary disclosure bars a subsequent claim of privilege based on confidentiality."). This rule would turn that principle on its head, so that disclosures would not waive a claim of privilege if the disclosing party simply says, after the fact, "we didn't mean to."

Moreover, in federal court cases where "State law supplies the rule of decision, the privilege of a ... person ... shall be determined in accordance with State law." Rule 501, F. R. Evid. The proposed rule would abrogate that principle as to states, like Alabama, where disclosure of information waives a claim of privilege.

For the same reasons, we object to proposed Rule 26(f)(4), which contemplates "an

order protecting the right to assert privilege after production of privileged information."

Rule 37

We object to proposed Rule 37(f), which inappropriately minimizes the possibility of sanctions where parties destroy electronically stored information. This rule would give incentives to creation of routine procedures to destroy electronically stored information. This proposed rule would prohibit sanctions if all three of the following conditions occur: (1) the party did not violate a court order; (2) the party took "reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action" (proposed Rule 37(f)(1); emphasis added); and (3) the destruction resulted "from loss of the information because of the routine operation of the party's electronic information system" (proposed Rule 37(f)(2)). This creates an incentive for early destruction of electronic records because, if such destruction occurs before suit is filed, the entity would have no reason to know that it would be "discoverable in the action" that is not yet filed. Even if a broader reading of notice of discoverability is allowed, an entity would still have incentives to create short time frames for routine erasure. Whenever the entity should come to know that information is discoverable, if routine procedures have deleted files more than, say, a month old, relevant information would already have been lost. The Federal Rules of Civil Procedure should not create an incentive for routine document destruction.

This amendment would delete the requirement that a party must move for judgment as a matter of law at the close of all the evidence as a prerequisite for making a renewed motion for judgment as a matter of law after an adverse jury verdict. It does retain a requirement that such a pre-verdict motion must be made, but it now "may be made at any time before the case is submitted to the jury." Proposed Rule 50(a)(2). In short, a defense motion for JML at the close of the plaintiff's evidence would be sufficient to preserve the right to renew such a motion after a plaintiff's verdict.

The rationale for requiring the pre-verdict JML motion to be made at the close of all the evidence is that any deficiency in the evidence at an earlier stage of the proceeding may have been cured by the time all the evidence is in. For example, if the defendant makes a pre-verdict motion for JML at the close of the plaintiff's case, arguing that a particular element of the plaintiff's case had not been proved, the trial court may defer a ruling or deny the motion by inclining, on a close call, to respect the right of trial by jury. By the close of the evidence, the plaintiff might cure any such deficiency either through cross-examination of a defense witness or through rebuttal testimony. Thus, to put a trial court in error for submitting the claim to the jury, the defendant must make the motion at the close of all the evidence. Similarly, the post-verdict JML motion allows a party to argue that the case should not have been presented to the jury only if the party asserted the precise ground for a JML before the court submitted the case to the jury. This rationale

still holds true: for a party to argue that a verdict must be thrown out and the case or claim dismissed, the party must have asked for this relief at the appropriate time before the jury was allowed to consider the case or the claim. If a pre-verdict motion was not made after all the evidence had been heard, the party should not be allowed to argue in a post-verdict JML motion that the court erred in submitting the case to the jury.

The only justification offered by the committee for this rule change is that, despite the existence of this rule for decades, parties continue to fail to abide by it. The Committee notes also that courts are ingrafting exceptions. It is not necessarily a bad thing to relieve a party in appropriate circumstances from the effect of a rule. However, this proposed amendment would undermine the very logic by which a trial court can take a case away from a jury, by allowing a post-verdict JML motion to argue that an early pre-verdict JML motion was sufficient to require the trial court to conclude later, as the case is being submitted to the jury, that the case should be thrown out despite the lack of a renewed insistence upon such a result.

In short, the proposed change would undermine the logic of the rule, encourage sloppy and lazy lawyering, and set traps for trial judges. Those who would prevent a case from being decided by a jury should continue to have the burden of saying so after all the evidence has been presented.

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