THE STATE BAR OF CALIFORNIA

– COMMITTEE ON FEDERAL COURTS

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09-BK-133

Via E-mail

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09-CR-007

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

09-EV-015

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

Rule 2019

The Committee endorses and adopts the comments submitted by the Insolvency Law Committee of the Business Law Section of the State Bar of California, by letter dated February 12, 2010. With regard to the proposed amendments to Rule 2019, the Committee submits the following additional comments.

The Committee believes that the rule should only apply to the extent that an entity, group or committee not only (a) consists of or represents more than one holder of debt or equity but also (b) participates in the bankruptcy case in that capacity, as opposed to a standing organization with purposes beyond the scope of the case that participates in other ways (such as by filing an amicus brief). For example, if a "League of Concrete Vendors" were a multi-purpose association

which had activities beyond the scope of the specific bankruptcy case at issue (such as the National Association of Manufacturers (NAM)), and if that League were to file an amicus brief and were not representing any holders of debt or equity in the case, then Rule 2019 should not apply to the League. In addition, even if such a League were to represent creditors or equity holders in the case, the Committee believes the League should only have to disclose information relative to such creditors, not all of its other members.

The Committee also urges that any revision of Rule 2019 include clarifying language that limits its application only to (a) an "entity, group or committee" when the purpose of such a grouping is to act in the name of an official or unofficial class or group of creditors or interest holders, as opposed to the use of a name of convenience to cover specific named parties, or (b) such other entity, group or committee as the court may direct, after notice and a hearing, provided that (i) such entity, group or committee is participating in the case by seeking or opposing the granting of relief, and (ii) any such disclosures are subject to the ordinary rules limiting discovery (such as requirements as to relevance, and protections of trade secrets and confidences). For example, the Committee believes that Rule 2019 should not normally apply if an appearance is made by "Company A, Company B and Person C, referred to herein as the 'Equipment Lessors.' " In such a circumstance, the group title of "Equipment Lessors" is purely a convenient shorthand reference term for the specific parties named once in each pleading or appearance, and does not denote authority to represent any other parties, other than those specifically named.

II. Federal Rules of Criminal Procedure

Proposed New Rule 4.1

The Committee is concerned that proposed Rule 4.1 would no longer require a recording or verbatim transcription of the magistrate and the affiant during the communication pertinent to obtaining warrants, complaints, and summons. Although the rule recommends that the judge record the testimony taken under oath, there is no requirement to do so. A written summary or order suffices where the testimony is limited to attesting to the contents of a written affidavit transmitted by reliable electronic means.

The Committee is concerned about the possibility of losing a complete and accurate record. In contested search and arrest warrants, it is important to have a transcript of the probable cause determination. While the probable cause statement is available to counsel, the background is not. For this reason, the Committee recommends that the requirement for transcription or recording stay intact, whether it means producing and maintaining voice recordings, email, or other recording methods necessary to maintain a clear and complete record.

III. Federal Rules of Evidence

As an initial matter, although all the Committee Notes to the revised rules indicate the changes are stylistic and not substantive, for consistency and clarity, we believe there should be a general rule (comparable to Federal Rule of Civil Procedure 86), expressly stating that the 2010

revisions are stylistic only. In addition, we note that the proposed amendments to several rules have added or changed the subpart headings, which could make legal research confusing. One example is Federal Rule of Evidence 608(b), which now has two paragraphs, but the substance of the second paragraph would be moved to Federal Rule of Evidence 608(c). For each rule that has a change in the subpart headings, we suggest that the Committee Notes mention the change so that legal research will not be hampered.

As for the specific rule changes, the Committee has the following comments:

Rule 104(b)

The Committee believes the proposed revisions make the rule less clear, and suggests that the language proposed by the American College of Trial Lawyers be adopted instead.

Rules 802 and 901(b)(10)

The current version of Federal Rule of Evidence 802 provides that hearsay is not admissible except as provided by the Federal Rules of Evidence or "by other rules prescribed by the Supreme Court *pursuant to statutory authority or by Act of Congress*" (emphasis added). This language suggests that rules prescribed by the Supreme Court cannot provide for admissible hearsay absent some specific statutory authority or Act of Congress. The proposed revision would delete the phrase "pursuant to statutory authority or by Act of Congress." If deletion of that phrase expands the authority of the Supreme Court, it would be a substantive change, and not simply stylistic.

The current version of Federal Rule of Evidence 901(b)(10) deals with the requirement of authentication or identification, and provides for any method of authentication or identification "provided by Act of Congress or by other rules prescribed by the Supreme Court *pursuant to statutory authority*" (emphasis added). Similar to the proposed amendment to Rule 802, the proposed amendment to Rule 901(b)(10) would delete "pursuant to statutory authority." If deletion of that phrase expands the authority of the Supreme Court, it would be a substantive change, and not simply stylistic.

Rules 901(b)(7)(B), 902(4) and 1005

In each of these three rules, the phrase "authorized to be recorded or filed . . . " would be changed to "lawfully recorded or filed." In the Committee's view, this leaves it ambiguous as to whether "lawfully" modifies both "recorded" and "filed," which we believe the original rule intended. Therefore, we suggest that the amendments to these three rules add the word "lawfully" in front of "filed," reading "lawfully recorded or lawfully filed."

Disclaimer

This position 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.

Very truly yours,

Joan Jacobs Levie
Chair, 2009-2010
The State Bar of California
Committee on Federal Courts