

09-CV-A



"Edward H. Cooper"  
04/06/2009 11 29 AM

To Peter\_McCabe  
cc "Paul Carrington"  
Subject Fwd: Re Rule 4

Date: Mon, 06 Apr 2009 10:54:42 -0400  
From: "Paul Carrington" <pdcc@law.duke.edu>  
To: <coopere@umich.edu>  
Subject: Re: Rule 4

> I have once again been (after some years) teaching an International  
> > Litigation course and pondering Rule 4. You will recall that we  
> > re-wrote Rule 4 in 1993 in part to connect it with the international  
> > conventions and in part to internationalize the wonderful California  
> > rule that a defendant who refuses to accept cheap service must bear  
> > the cost. In 1990, I explored the issue with several small groups  
> > of Europeans and detected a low level of dissatisfaction based  
> > wholly on their satisfaction that translation costs made it  
> > costly for Americans to sue European firms in our courts. An  
> > effort was otherwise made in the new draft to respond to their hopes.  
> We sent a copy over to the State Department at the time the draft was  
> > published and got no objection from them. We then published our  
> > draft for public comment. It went through the standing committee  
> > and the Judicial Conference without a beep.  
> >  
> > So our draft was in the Supreme Court awaiting publication to  
> > Congress when the British Embassy hired Erwin Griswold to tell the  
> > Court that they objected to the application of the California rule  
> > to the Queen's subjects. Erwin detected that his client was moved  
> > to speak by other EU members who aspired to keep translation costs  
> > on American plaintiffs. He communicated the objection to the Chief  
> > Justice. No hearing was held. No public statement was  
> > made. I do not know whether other Justices were consulted.  
> Unbeknownst to anyone engaged in the rulemaking process  
> > except Sam Pointer, then chair of the Civil Rules Committee, the  
> > rule was fixed so that the California rule did not apply to  
> > foreigners. Sam achieved this without public discussion or  
> > committee review of the revision, as the Chief preferred. Quite  
> > reasonably under the circumstances, Sam made the least change  
> > possible that achieved the desired result, by adding the phrase  
> > "located within the United States" to Rule 4(d). But without the  
> > benefit of 4(d), the complexities of 4(f) are more of a burden than we  
> > reckoned they would be. I suggest that 4(f) might deserve a little  
> > attention. Or even better, maybe we could consider deleting the  
> > phrase Sam erased at the direction of the Chief. What would the  
> > State Department say today?