

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
RICHARD SHEPPARD ARNOLD UNITED STATES COURTHOUSE
600 W. CAPITOL, ROOM 423
LITTLE ROCK, ARKANSAS 72201-3325
(501) 604-5140
Facsimile (501) 604-5149

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04-CV-D

BILL WILSON
JUDGE

February 9, 2004

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FEB 11 2004

LEE H. ROSENTHAL
U.S. DISTRICT JUDGE

The Honorable Lee H. Rosenthal, Chair
Advisory Committee on Civil Rules
United States District Court
11535 Bob Casey U. S. Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Dear Lee:

I recommend that your committee recommend to the Standing Committee that we return to the discovery rules as they were before the 1993 amendments. Perhaps a hortatory rule could be added to encourage judges to decide pre-trial motions with reasonable dispatch.

I'm convinced that the failure to judges to tend to pre-trial disputes promptly (especially those involving discovery) is the primary cause of discovery abuse, and contributes much to incivility amongst lawyers.

As a member of the Standing Committee I voted for the '93 amendments, but just barely. Despite my misgivings I voted "yea" because of my great respect (which continues unabated) for the Advisory Committee chair and members, and the committee's reporter.

Although my misgivings grew in the years following the '93 amendments, my learning was mostly from afar -- both Arkansas Districts opted out, and we continued as we had before these amendments. We operated under the much worn, but accurate, phrase "if it ain't broke, don't fix it." And we got along quite well, I think.

I think nearly everyone came to agree that the opt out proviso was a mistake, and a bad 'un. Some districts opted out of more than the rules permitted, some adopted local rules on the subject, and, as time passed, practitioners became less and less familiar with the rules, as they were before the '93 amendments.

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The result was a crazy quilt of discovery rules around the country. Because the amendments removed the opt out provision I voted for them. I believe, but can't remember for sure, that I moved orally that we recommend that the Supreme Court return us to the pre-'93 discovery rules. I believe there was no second, so the motion died aborning. While I was serious in the sentiment, such a motion would normally recommend sending the issue back to the Advisory Committee for study.

Be all of this as it may, I am convinced that the current discovery rules require far too much front end loading. Before becoming a judge I worked in several political campaigns. I think that some of these efforts failed because we had too many meetings, rather than expending our time and effort out amongst the voters ("we met ourselves out of an election" was the observation of one of my coworkers in an unsuccessful race. All of the front end stuff under the current discovery rules puts me in mind of this.

Despite all of the early meetings and exchanges, I do not believe that a judge who views discovery disputes in the same light as a goat views a butcher knife, I will get involved as the rules contemplate.

Back when Dizzy was broadcasting the Falstaff Game of the Week, he would issue what he considered was a profundity, then state, "Them there is my views." Above, you have mine.

If my proposal is too heavy, my fall back position is expressed in the estimable Greg Joseph's letter to me of January 30, 2004 -- copy enclosed.

Thank you for your consideration.

Cordially,



Wm. R. Wilson, Jr.

cc: Chair, Standing Committee

GREGORY P. JOSEPH LAW OFFICES LLC

805 THIRD AVENUE

NEW YORK, NEW YORK 10022

(212) 407-1200

WWW.JOSEPHNYC.COM

GREGORY P. JOSEPH

DIRECT DIAL: (212) 407-1210

DIRECT FAX: (212) 407-1280

EMAIL: gjoseph@josephnyc.com

FACSIMILE
(212) 407-1299

January 30, 2004

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Wm. R. Wilson, Jr.
U. S. District Judge
E.D. of Arkansas

By First Class Mail

Honorable William R. Wilson, Jr.
United States District Court
Eastern District of Arkansas
600 W. Capitol, Room 423
Little Rock, Arkansas 72201-3325


Dear Bill:

Thanks for your letter of January 20, 2004. It is always a pleasure to hear from you. Short of unringing the bell and reverting to pre-1993 days, to address the dilemmas we are concerned about, there are a few straightforward solutions:

- In Rule 26(a)(2)(B), change "considered" to "relied on."
- Eliminate discovery of drafts of expert reports.
- In Rule 26(a)(1)(A) and (B), after the word "use," insert "at trial."

This wouldn't solve every problem, but there will always be some problems. I hope to see you soon.

Best regards,


Gregory P. Joseph

GPJ/sc - 548851