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THE NEW AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND
THEIR EFFECT ON FEDERAL COURT PRACTICE IN THE NORTHERN DISTRICT

ALBANY COUNTY BAR ASSOCIATION - FEBRUARY 29, 1984

I. PRELIMINARY REMARKS - CLERKS; S. COFFEY ON 42 U.S.C.
§ 1983.

II. HISTORY OF THE COUNTY OF ALBANY - PUBL. 1886 -
LEGAL HISTORY OF ALBANY COUNTY BY L.B. PROCTOR

"ALBANY HAS LONG BEEN THE SEAT OF THE LAW-MAKING POWER OF
THE STATE; HERE THE GREAT COURTS OF DERNIER RESSORT HAVE HELD
THEIR SITTINGS SINCE THE ADOPTION OF THE FIRST CONSTITUTION.
HERE, TOO, THE SUPREME COURT OF THE STATE, PRESIDED OVER BY THE
ABLEST JURISTS IN THE NATION, HAS HELD ITS REGULAR TERMS FROM
1777 DOWN TO 1885. HERE, ALSO, FOR NEARLY TWO CENTURIES, OTHER
IMPORTANT COURTS HAVE PRONOUNCED THE LAWS.

"AMONG THE JUDGES AND LAWYERS WHO HAVE CONDUCTED THESE
COURTS 'THERE HAVE BEEN MANY DIVERSITIES OF TALENTS AND ABILITIES.
THERE HAVE BEEN THOSE OF THE BAR WHO WERE LISTENED TO WHOLLY FOR
THEIR INTELLECTUAL QUALITIES, FOR THE WIT OR THE WISDOM, THE
LEARNING OR THE PHILOSOPHY, WHICH CHARACTERIZED THEIR EFFORTS.

THERE HAVE BEEN THOSE WHOSE MAIN ATTRACTION WAS A CURIOUS FELICITY AND FACILITY OF ILLUSTRATION AND DESCRIPTION, ADORNED BY THE RICHEST GEMS WHICH COULD BE GATHERED BY HISTORICAL RESEARCH OR CLASSIC STUDY. THERE HAVE BEEN THOSE TO WHOM THE CHARMS OF MANNER, THE GRACE OF ELOCUTION AND THE MELODY OF VOICE WERE THE ALL-SUFFICIENT RECOMMENDATION TO APPLAUSE. THERE HAVE BEEN THOSE WHO OWED THEIR SUCCESS MORE TO OPPORTUNITY AND OCCASION, TO SOME STIRRING THEME OR SOME EXCITING EMERGENCY, THAN TO ANY PECULIAR ATTRIBUTES OF THEIR OWN. AND WE MAY SAY THAT THERE HAVE BEEN THOSE WHO COMBINED IN A LARGE DEGREE ALL OF THESE QUALITIES.'

"IN WRITING THE HISTORY OF THE BENCH AND BAR OF ALBANY COUNTY ONE FEELS AS THOUGH HE WAS WRITING THE HISTORY OF THE BENCH AND BAR OF THE STATE ITSELF, SUCH IS THE COMMANDING INFLUENCE THEY HAVE HAD AND STILL HAVE IN LEGAL HISTORY."

III. WHAT PROCTOR IS SAYING - ALBANY COUNTY BAR MEMBERS EITHER SCHOLARLY, FACILE, WITTY, CHARMING OR LUCKY OR ALL COMBINED. I FIND IT SO TODAY -
JUDGE TO LAWYER: YOU ARE INTOXICATED. LAWYER TO JUDGE: THAT IS THE ONLY CORRECT JUDGMENT YOUR HONOR HAS MADE DURING THIS TERM OF COURT.

IV. PROCESS OF AMENDMENT OF FEDERAL RULES -

(A) ADVISORY COMMITTEES - CIVIL, CRIMINAL, EVIDENCE, ETC.

(B) STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

(C) U.S. SUPREME COURT TRANSMITS TO CONGRESS.

(D) IF NO ACTION WITHIN 90 DAYS (IN CASE OF CIVIL RULES) - EFFECTIVE.

(E) INACTION AS TO NEW CIVIL RULES EFFECTIVE AUG. 1, 1983.

V. CASE MANAGEMENT IN THE FEDERAL COURTS -

(A) COURT CONTROL FROM DATE OF FILING.

(B) SERVICE WITHIN 120 DAYS AFTER FILING COMPLAINT OR DISMISS - FED. R. CIV. P. 4(J) - EXCEPT FOR GOOD CAUSE SHOWN.

(C) MONITORING CASES - SHOW CAUSE WHY SHOULD NOT BE DISMISSED FOR FAILURE TO PROSECUTE.

(D) SCHEDULING ORDERS -

(E) 3RD JUDICIAL DISTRICT PROPOSAL A PALE IMITATION - PRE-CALENDAR PRACTICE RULES.

(F) AUG. 1, 1983 AMENDMENTS DESIGNED TO GIVE JUDGE GREATER MANAGEMENT CONTROL AND TO INCREASE LAWYER RESPONSIBILITIES.

VI. AMENDMENTS TO RULES 7 & 11 (SIGNING)

(A) RULES 7 AND 11 NOW REQUIRE THAT ALL MOTIONS AND OTHER PAPERS AS WELL AS PLEADINGS BE SIGNED BY ONE ATTORNEY OF RECORD.

(B) SIGNING IS A CERTIFICATION THAT THE ATTORNEY (OR PARTY IF PRO SE) HAS READ THE PAPER AND "THAT TO THE BEST OF HIS KNOWLEDGE, INFORMATION AND BELIEF FORMED AFTER REASONABLE INQUIRY IT IS WELL GROUNDED IN FACT AND IS WARRANTED BY EXISTING LAW OR A GOOD FAITH ARGUMENT FOR THE EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW, AND THAT IT IS NOT INTERPOSED FOR ANY IMPROPER PURPOSE, SUCH AS TO HARASS OR TO CAUSE UNNECESSARY DELAY OR

NEEDLESS INCREASE IN THE COST OF LITIGATION." MORE STRINGENT THAN PRIOR GOOD FAITH STANDARD.

(c) STRIKE PAPER IF NOT SIGNED, AFTER OMISSION CALLED TO ATTENTION OF PLEADER OR MOVANT.

(d) IF PAPER SIGNED IN VIOLATION OF RULE, SANCTIONS: ORDER TO PAY REASONABLE EXPENSES INCURRED BECAUSE OF THE FILING OF THE PLEADING, MOTION OR OTHER PAPER, INCLUDING A REASONABLE ATTORNEY'S FEE.

(e) SANCTIONS MAY BE IMPOSED BY COURT UPON MOTION OR SUA SPONTE AGAINST ATTORNEY OR CLIENT.

(f) USED ONCE IN WELL PUBLICIZED CASE. WILL USE IN OTHER CASES IF WARRANTED. E.G. CIVIL RIGHTS SUITS AGAINST JUDGES - WHERE JUDICIAL IMMUNITY APPARENT. CONCERNS ABOUT COLLATERAL LITIGATION - MOTIONS FOR SANCTIONS. WHERE SUA SPONTE, NO FURTHER HEARING OR INQUIRY NECESSARY.

(g) RULE ON SANCTIONS RE PLEADINGS AT END OF CASE AND RE MOTIONS AFTER DECISION ON MOTION.

(H) ADVISORY COMMITTEE NOTE: "THE COURT IS EXPECTED TO AVOID USING THE WISDOM OF HINDSIGHT AND SHOULD TEST THE SIGNER'S CONDUCT BY INQUIRING WHAT WAS REASONABLE TO BELIEVE AT THE TIME THE PLEADING, MOTION OR OTHER PAPER WAS SUBMITTED. THUS, WHAT CONSTITUTES A REASONABLE INQUIRY MAY DEPEND ON SUCH FACTORS AS HOW MUCH TIME FOR INVESTIGATION WAS AVAILABLE TO THE SIGNER; WHETHER HE HAD TO RELY ON A CLIENT FOR INFORMATION AS TO THE FACTS UNDERLYING THE PLEADING, MOTION, OR OTHER PAPER; WHETHER THE PLEADING, MOTION, OR OTHER PAPER WAS BASED ON A PLAUSIBLE VIEW OF THE LAW; OR WHETHER HE DEPENDED ON FORWARDING COUNSEL OR ANOTHER MEMBER OF THE BAR."

(I) CHIEF JUSTICE BURGER ADVISES USE. SUPREME COURT LAST YEAR IMPOSED SANCTIONS FOR THE FIRST TIME FOR A FRIVOLOUS APPEAL TO THAT AUGUST BODY. USE SPARINGLY FOR EGREGIOUS CASES.

VII. AMENDMENTS TO RULE 16

(A) "PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT." EXTENSIVELY REVISED. SHOULD HOLD NO MYSTERY FOR THOSE WHOSE CASES ASSIGNED TO ME. RULES REQUIRE FIRST SCHEDULING ORDER WITHIN 120 DAYS AFTER COMPLAINT FILED. EXCEPTIONS BY LOCAL RULE. OUR NEW LOCAL RULE 49 - SOCIAL SECURITY; MATTERS BASED ON

ADMINISTRATIVE RECORD; PRISONERS' MATTERS; COMPEL ARBITRATION;
OTHER; WHERE CAN'T GET TO IT WITHIN 120 DAYS.

(B) SCHEDULING CONFERENCE BEFORE SCHEDULING ORDER - MAY
USE TELEPHONE, MAIL, OTHER SUITABLE MEANS. LEAVE OF COURT
REQUIRED FOR MODIFICATION UPON SHOWING GOOD CAUSE.

(C) FINAL PRETRIAL CONFERENCE AS CLOSE TO TRIAL DATE AS
POSSIBLE; FORMULATE PLAN FOR TRIAL INCLUDING "A PROGRAM FOR
FACILITATING THE ADMISSION OF EVIDENCE."

(D) SUBJECT OF PRETRIAL CONFERENCES (FLEXIBLE) & ACTION:

1. SIMPLIFICATION OF ISSUES.
2. AMENDMENTS TO PLEADINGS.
3. STIPULATIONS AND ADVANCE RULINGS ON EVIDENCE.
4. AVOIDANCE OF UNNECESSARY PROOF.
5. IDENTIFICATION OF WITNESSES AND DOCUMENTS,
SCHEDULES FOR EXCHANGE OF BRIEFS AND FURTHER CONFERENCES.
6. ADVISABILITY OF REFERENCES TO MAGISTRATE.
7. POSSIBILITY OF SETTLEMENT OR USE OF EXTRA -
JUDICIAL PROCEDURES.
8. FORM AND SUBSTANCE OF PRETRIAL ORDERS.

9. DISPOSITION OF PENDING MOTIONS.

10. SPECIAL PROCEDURES FOR PROTRACTED ACTIONS AND DIFFICULT PROBLEMS.

11. SUCH OTHER MATTERS AS MAY AID IN THE DISPOSITION OF THE ACTION. (CATCH-ALL).

(E) SANCTIONS FOR FAILURE TO ATTEND PRE-TRIAL CONFERENCE OR OBEY PRETRIAL ORDER OR FOR FAILURE TO PARTICIPATE IN GOOD FAITH - EXPENSES, ATTORNEY'S FEES, PRECLUSION, STRIKE PLEADINGS, DEFAULT JUDGMENT, CONTEMPT CITATION. IMPOSE SANCTION ON MOTION OR SUA SPONTE.

VIII. AMENDMENTS TO RULE 26 (DISCOVERY)

(A) OLD RULE 26(A) DELETED: PROVIDED THAT FREQUENCY OF USE OF VARIOUS METHODS UNLIMITED. AMENDMENT TO ALLOW JUDGES TO IMPOSE LIMITS AND ELIMINATE NEEDLESS DISCOVERY.

(B) NEW 26(B)(1) REQUIRES LIMITATION OF DISCOVERY IF THE COURT DETERMINES THAT:

1. THE DISCOVERY SOUGHT IS UNREASONABLY CUMULATIVE OR DUPLICATIVE, OR IS OBTAINABLE FROM SOME OTHER SOURCE THAT IS MORE CONVENIENT, LESS BURDENSOME, OR LESS EXPENSIVE;

2. THE PARTY SEEKING DISCOVERY HAS HAD AMPLE OPPORTUNITY BY DISCOVERY IN THE ACTION TO OBTAIN THE INFORMATION SOUGHT;

3. THE DISCOVERY IS UNDULY BURDENSOME OR EXPENSIVE, TAKING INTO ACCOUNT THE NEEDS OF THE CASE, THE AMOUNT IN CONTROVERSY, LIMITATIONS ON THE PARTIES' RESOURCES, AND THE IMPORTANCE OF ISSUES AT STAKE IN THE LITIGATION.

4. LIMITATION ORDER MAY BE BY COURT ON OWN INITIATIVE AFTER REASONABLE NOTICE OR PURSUANT TO MOTION.

(c) FEDERAL SYSTEM STARTING TO CLOSE THE WIDE OPEN DOOR TO DISCOVERY.

(d) NEW 26(g) - SIMILAR TO RULE 11 - REQUIRES LAWYER OR PRO SE PARTY TO SIGN EACH DISCOVERY REQUEST, RESPONSE OR OBJECTION. AS IN RULE 11, THIS SIGNATURE ALSO IS A CERTIFICATION THAT THERE HAS BEEN A "REASONABLE INQUIRY." IT CERTIFIES THAT THE PERSON SIGNING HAS READ THE REQUEST, RESPONSE OR OBJECTION AND TO THE BEST OF THAT PERSON'S KNOWLEDGE, INFORMATION AND BELIEF FORMEDAFTER THE REQUIRED INQUIRY IT IS:

1. CONSISTENT WITH THE RULES AND WARRANTED BY EXISTING LAW OR A GOOD FAITH ARGUMENT FOR THE EXTENSION, MODIFICATION OR REVERSAL OF EXISTING LAW.

2. NOT INTERPOSED FOR ANY IMPROPER PURPOSE SUCH AS TO HARASS OR TO CAUSE UNNECESSARY DELAY OR NEEDLESS INCREASE IN THE COST OF LITIGATION.

3. NOT UNREASONABLE OR UNDULY BURDENSOME OR EXPENSIVE, GIVEN THE NEEDS OF THE CASE, THE DISCOVERY ALREADY HAD IN THE CASE, THE AMOUNT IN CONTROVERSY, AND THE IMPORTANCE OF THE ISSUES AT STAKE IN THE LITIGATION.

(E) SANCTIONS FOR CERTIFICATION MADE IN VIOLATION OF 26(G) REQUIRED - "SHALL" - UPON PARTY OR ATTORNEY OR BOTH.

"APPROPRIATE" SANCTION TO BE DETERMINED BY COURT, INCLUDING ATTORNEY'S FEES INCURRED BECAUSE OF THE VIOLATION - BY COURT ON OWN INITIATIVE OR BY MOTION.

(F) MORE FEAR OF COLLATERAL LITIGATION. MY PRACTICE - RESOLVE IN DISCOVERY CONFERENCE - NO DISCOVERY MOTIONS - PERMITTED BY 26(F). NOTE LOCAL RULE 46 REQUIRING GOOD FAITH EFFORTS. USE SANCTIONS SPARINGLY.

IX. OTHER AMENDMENTS

(A) RULE 52(A) - FINDINGS OF FACT AND CONCLUSIONS OF LAW MAY BE MADE ORALLY IN NON-JURY TRIALS FOLLOWING THE CLOSE OF EVIDENCE.

(B) RULE 67 - PROCEDURES FOR DEPOSIT IN COURT AND PROVISION FOR INTEREST ON THE FUND DEPOSITED.

(C) RULES 6, 53 AND 72-76 RELATE TO IMPLEMENTATION OF THE 1979 AMENDMENTS TO THE FEDERAL MAGISTRATES ACT. OUR MAGISTRATES: SOCIAL SECURITY; PRISONERS' CIVIL RIGHTS AND HABEAS CORPUS REPORT- RECS. REFER NON-DISPOSITIVE MATTERS FOR DETERMINATION. CAN HANDLE DISPOSITIVE MATTERS FOR REPORT-REC. USE AS SPECIAL MASTER - DIFFICULT CASES - AMENDMENT TO RULE 53 - ON CONSENT.

X. AMENDMENTS IN THE WORKS

(A) IMPOSITION OF ATTORNEY'S FEES ON ONE WHO REJECTS AN OFFER TO SETTLE AND THEN LOSES AT TRIAL OR WINS LESS THAN THE OFFERED AMOUNT. OPPOSED BY BAR ASSOCIATION AND N.Y. TIMES EDITORIAL: "COURT RELIEF, BUT NOT ROULETTE." CONTROVERSIAL.

(B) LOCAL RULES - APPROPRIATE PUBLIC NOTICE AND OPPORTUNITY TO COMMENT REQUIRED. RULES ADOPTED ON EXPERIMENTAL BASIS AND APPROVED BY CIRCUIT JUDICIAL COUNCIL MAY REMAIN IN EFFECT FOR TWO YEARS EVEN THOUGH INCONSISTENT WITH FED. R. CIV P.

(C) SUBPOENA FOR TAKING OF DEPOSITION MAY REQUIRE ATTENDANCE WITHIN 100 MILES FROM PLACE OF EMPLOYMENT OR RESIDENCE. Now - RESIDENT OF DISTRICT CAN BE SUBPOENAED TO ATTEND IN THE COUNTY WHERE HE IS EMPLOYED OR RESIDES AND NON-RESIDENT ONLY IN COUNTY WHERE SERVED OR WITHIN 40 MILES FROM PLACE OF SERVICE.

(D) MY PROPOSAL: COST OF SUMMONING JURY.

XI. IMPORTANT NEW CASES

(A) MIGRA V. WARREN CITY SCHOOL DISTRICT, 52 U.S.L.W 4151 (JAN. 24, 1984). FEDERAL FULL FAITH AND CREDIT STATUTE GIVES STATE COURT JUDGMENT SAME PRECLUSIVE EFFECT IN SUBSEQUENT 1983 SUIT IN FEDERAL COURTS AS IT WOULD HAVE IN STATE COURTS. SEEMS TO PORTEND A CHANGE IN SECOND CIRCUIT RULE. FORMERLY, IF E.G. FALSE ARREST STATE CLAIM LOST IN STATE COURT, COULD PURSUE 1983 IN FEDERAL COURT. NOW SEEMS TO BE BARRED BY APPLICATION OF N.Y.

RULE OF COLLATERAL ESTOPPEL OR RES JUDICATA. THE CLAIM "COULD HAVE BEEN RAISED" IN THE STATE COURT ACTION.

(B) PENNHURST STATE SCHOOL V. HALDERMAN, 52 U.S.L.W. 4131 (JAN. 24, 1984). ELEVENTH AMENDMENT PROHIBITS FEDERAL COURT FROM AWARDING INJUNCTIVE RELIEF REQUIRING STATE OFFICIALS TO CONFORM THEIR CONDUCT TO STATE LAW. RULE ALSO CLEARLY APPLIES TO DAMAGES. CAN'T SUE STATE OR ITS OFFICIALS ON STATE CLAIM IN FEDERAL COURTS. NO PENDENT CLAIM E.G. FALSE ARREST AGAINST STATE POLICE WITH 1983 CLAIM AS A RESULT.

XII. DUTY OF ATTORNEYS RE: PROBLEMS IN FEDERAL COURTS:

1. DIVERSITY - 25% OF CASELOAD.
2. SOCIAL SECURITY.
3. PRISIONERS' CIVIL RIGHTS AND HABEAS CORPUS.
4. LOAD IN N.D.N.Y.
5. QUESTION OF PRIORITIES.