

2/16/05

04-CV-208

MEMORANDUM

To: Lee Rosenthal  
From: Mark Kravitz  
Re: Proposed Amendments to Supplementary Rules, Rule G  
cc: Ed Cooper  
John Rabiej  
Date: February 16, 2005

As we discussed briefly in Washington, I am currently involved in a trial of a case under the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), 18 U.S.C. § 983. The trial caused me to review proposed Rule G of the Proposed Amendments to Supplementary Rules. I have a concern regarding the wording of proposed Rule G(9) that I want to bring to your attention.

As currently worded, Rule G(9) states as follows: "Trial is to the court unless any party demands trial by jury under Rule 38." The Advisory Committee note to the proposed rules says this: "Subdivision (9) serves as a reminder of the need to demand jury trial under Rule 38." If Subdivision (9) were written as simply a reminder of the need to file a jury demand when a jury trial is sought, the proposed rule would not be problematic. However, I believe that as worded, the proposed rule could be read to suggest that a party who files a jury demand is entitled to have the issues in a civil forfeiture action tried to the jury, and at least insofar as the issue of constitutional excessiveness is concerned (which is addressed in Rule G(8)(e)), any such suggestion would be contrary to both CAFRA and to pre-CAFRA case law. As a result, I urge your Committee to consider rewording proposed Rule G(9) to avoid any suggestion that all issues in a civil forfeiture action will be tried to a jury if a timely jury demand is filed.

I realize that there can be non-CAFRA forfeitures and that Rule G is intended to cover all civil forfeitures. My comments are limited to CAFRA. In civil forfeiture actions under CAFRA, there may be three general categories of issues that require decision: (1) whether the property is subject to forfeiture – that is, in certain cases, whether the Government has proved that the property had a substantial connection to an offense that gives rise to forfeiture (18 U.S.C. § 983(c)); (2) whether any claimant is an innocent owner of the property – that is, whether any claimant is an owner and whether he or she is "innocent" in accordance with standards set forth in the statute (18 U.S.C. § 983(d)); and (3) whether the forfeiture was constitutionally excessive – that is, whether forfeiture is grossly disproportionate to the gravity of the offense giving rise to the forfeiture (18 U.S.C. § 983(g)). While the first two categories of issues may be tried to a jury if a party makes a timely jury demand, CAFRA expressly provides that the issue of excessiveness will be decided "at a hearing conducted by the court without a jury." 18 U.S.C. § 983(g)(3).

CAFRA's approach – that courts, not juries, decide whether a forfeiture violates the Excessive Fines Clause of the Eighth Amendment – is consistent with that taken by courts prior to CAFRA's enactment. *See, e.g., United States v. Toyfoya*, No. CR-93-0505 EFL, 1994 WL 477173, at \*5 (N.D. Cal. Aug. 29, 1994) ("In the Court's opinion, the Court should make the determination of whether the forfeiture is excessive under the Eighth Amendment, not the jury."); *United States v. 24124 Lemay Street*, 857 F. Supp. 1373, 1376 (C.D. Cal. 1994) ("[T]he determination of whether a civil forfeiture violates the Excessive Fines Clause of the Eighth Amendment is a question of law suitable for determination by the Court."); *but see United States v. RR No. 1 Box 224*, 14 F.3d 864, 876 (3d Cir. 1994) (remanding to the district court to decide whether the court or the jury should make the excessiveness determination, and suggesting that

the district court "consider submitting the question to a jury on a special interrogatory and then alternately treating the answer as non-binding and decide the excessiveness question itself.").

The court in *Toyfoya* considered using special interrogatories to the jury "during the forfeiture trial to aid the court in later determining whether the forfeiture was grossly disproportionate."

*Toyfoya*, 1994 WL 477173, at \*5. While in theory discrete factual disputes related to excessiveness could be presented to a jury, even the *Toyfoya* court recognized that the ultimate determination of excessiveness is for the court, not the jury.

I am concerned that as written, proposed Rule G(9) – which immediately follows the provisions of Rule G8(e) concerning "Excessive Fines" – has the potential to cause confusion on whether a court or jury tries the issue of excessiveness. Presumably, the drafters' intent was that a timely jury demand would entitle a party to a jury trial *only* on those issues to which the party was entitled to a jury trial. And that may be how courts and parties will ultimately interpret the proposed language. However, given the fact that CAFRA explicitly addresses this subject and did so precisely to eliminate any question regarding who tries the issue of excessiveness, I believe our new rules should be worded to avoid confusion on that issue. There are many ways to solve this problem, and if your Committee agrees that the language of Rule G(9) requires some tinkering, I will leave it to Ed and others to come up with a solution that will satisfy the Style Subcommittee.