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TO: Board of Governors
Section Chairpersons
(Designated to Receive Public Statements)

FROM: Carol Ann Cunningham CAC

DATE: February 11, 1992

SUBJECT: EMERGENCY PUBLIC STATEMENT regarding Comments on Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence by the Section on Courts, Lawyers and the Administration of Justice

<u>48-hour expedited consideration requested on behalf of the Courts, Lawyers and the Administration of Justice Section</u>

Enclosed please find for your immediate review a one-page summary of a public statement prepared by the Courts, Lawyers and the Administration of Justice Section. Copies of the full text will be provided upon request. If you wish to have this matter placed on the next Board of Governors' agenda on March 10, please call me by 5:00 p.m. on Thursday, February 13. I can be reached at (202) 331-4364.

Please note that according to the Guidelines regarding public statements (pp. 39-52) your telephone call "must be supplemented by a written objection lodged within seven days of the oral objection."

Enclosures

cc w/enclosures:
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SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR

COMMENTS ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE

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Committee on Court Rules

February 15, 1992

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The views expressed herein represent only those of the Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar and not those of the Bar or its Board of Governors.

COMMENTS OF THE SECTION ON COURTS, LAWYERS, AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has solicited comments on a preliminary draft of amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence proposed by the Judicial Conference Advisory Committee on Civil Rules. The Section on Courts, Lawyers, and the Administration of Justice of the District of Columbia Bar, and its Committee on Court Rules, submit these comments concerning certain of these proposals.

The District of Columbia's Bar is the integrated bar for the District of Columbia. Among the Bar's sections is the Section on Courts, Lawyers, and the Administration of Justice. The Section has a standing Committee on Court Rules, whose responsibilities include serving as a clearinghouse for comments on proposed changes to court rules. Comments submitted by the Section represent only its views, and not those of the D.C. Bar or of its Board of Governors.

The proposed amendments to the Federal Rules fall into four basic categories. The first category consists of changes to Rule 11 of the Federal Rules of Civil Procedure. Although we do not take a position concerning the basic substance of the proposed Rule, we do suggest ways in which the proposal could be improved -- particularly with respect to the "safe harbor" provision -- if its general approach is adopted.

The second category of proposed amendments deals with changes to the discovery process. The most significant of these changes would restructure the discovery process by requiring automatic disclosure of certain information and postponement of additional discovery until that disclosure is complete. We believe that the automatic disclosure procedure would delay and complicate the discovery process. We support other proposed changes, for example, imposing limitations on depositions and interrogatories. We also suggest modifications of some other aspects of the proposed discovery changes.

Third, we generally support the proposed amendments to Rule 56, which would make the Rule consistent with actual practice and with developments in the case law. We comment on two relatively minor aspects of the proposed rule for summary adjudication, involving the mechanism for identifying facts not genuinely in dispute and the possibility of hearings with oral testimony.

Finally, we generally endorse the proposed changes dealing with expert witnesses as a reasonable measure to reduce the unnecessary use of experts and the cost of litigation. We do, however, question whether expert depositions should be admissible regardless of the availability of the expert.

Our specific comments follow.

RULE 11

Perhaps no provision in the Federal Rules of Civil Procedure has engendered as much recent controversy among judges and lawyers as has Rule 11. We do not take a position in the ongoing debate about whether Rule 11 goes too far or not far enough in making sanctions available. The proposed amendment appears intended to make relatively modest changes in the Rule. We identify concerns and suggest modifications about the way the proposed Rule implements its approach.

In our view, the most significant change in Rule 11 would be to create a "safe harbor" for even the most egregious Rule 11 violation -- to give parties or counsel absolute protection against sanctions if they withdraw a filing after receiving reasonable notice of opposing parties' contention that the filing violates Rule 11. We have no objection to a requirement that, before seeking Rule 11 sanctions, a party provide notice through a simple statement describing the objections to the challenged filing, so that the other party has an opportunity to withdraw the filing. Such a requirement would be consistent with current practice and with some local rules.

However, the type and method of notice required under the proposed amendment is unclear and perhaps unduly burdensome. Rule 11(c)(1)(A) appears to require service of a party's motion or the Court's order to show cause as the mechanism for providing notice. Any requirement that the alleged victim of a Rule 11 violation prepare a formal

motion, accompanied perhaps by a detailed memorandum of law and supporting evidence, could operate as a substantial deterrent to pursuit of significant Rule 11 violations if the alleged violator could completely avoid sanctions by withdrawing a filing after forcing the alleged victim to incur that burden and expense.

The proposed Rule is ambiguous as to whether the party receiving a show cause order under subsection (c)(1)(B) may withdraw or correct the offending filing and thereby avoid sanctions, as the party may under subsection (c)(1)(A). We see no reason for such a distinction, and the safe harbor should be as broad for challenges initiated by the court as for those initiated by parties.

The proposed revision is also ambiguous about when the movant notifies the Court of a Rule 11 challenge. Subparagraph (c)(1)(A) provides that a sanctions motion is to be served upon the party that filed the challenged paper 21 days before it is filed with the Court. But the parenthetical phrase of this subparagraph also indicates that some notice apparently should be given to the Court before 21 days have elapsed, at least if the Court is asked to prescribe "such other time" for withdrawal or correction. In addition, the Rule should make clear that the time for response begins to run 21 days after service, not from the day of service as some local rules provide. E.g., Local Rule 108(b) (D.D.C.). The motion procedure should be described more specifically if this proposed change is ultimately adopted.

Finally, the proposed revision apparently requires parties to amend their filings each time new facts are discovered that make it improper to maintain any contention that was reasonable when initially made. Although the "safe harbor" provision in subsection (c) tends to mitigate the practical impact of this requirement, it could subject both courts and counsel to the burden of frequent motions to amend the pleadings, even with respect to relatively insignificant facts. If this is the intended effect, it should be clarified.

DISCOVERY

<u>Automatic Disclosures</u>

The Section believes that the automatic disclosure procedure, particularly with respect to witnesses and documents, would accomplish little in most cases except to delay the completion of discovery. Given the relatively limited scope of the initial disclosures, and the concern that opposing parties would interpret them more narrowly than appropriate, each party could be expected to serve subsequent interrogatories and document requests as broad as those now in use. However, under the proposal, such discovery requests could not be served, and no responses would be obtained, until some time after the initial automatic disclosure. Thus, the automatic disclosure procedure would probably not achieve its intended result of simplifying and expediting the discovery process, but would rather cause delay and complica-

tion. An alternative, simpler way to ensure that discovery begins promptly would be to require initial discovery requests to be served within a specified time after issue is joined.

Compounding our concerns about the automatic disclosure requirement is the likely uncertainty about the scope of the required initial disclosures: how does a party decide whether a person or category of document "bears significantly on any claim or defense"? Particularly at the early pleading stage, and in more complicated cases, a party cannot always anticipate the theories underlying another party's claims or defenses. The Committee Note states that "counsel are expected to disclose the identity of those persons who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the parties." Yet, opposing counsel may often legitimately differ about who might be expected to be deposed or called as a witness.

Because of the possibility of severe sanctions resulting from an incomplete disclosure, the risks resulting from uncertainty about the scope of disclosure are serious. While the same kinds of risks currently exist to a certain extent with respect to case-specific discovery requests, a responding party can protect itself by objecting to vague and ambiguous requests. Moreover, the opportunity for mandatory preclusion under proposed Rule 37(c)(1) might result in more discovery motions by encouraging parties regularly to chal-

lenge the completeness of disclosures. At the very least, adoption of the proposal would lead to several years of costly litigation about the scope of the initial disclosure obligation in districts around the county.

For these reasons, we do not support the proposed requirement for initial automatic disclosure. If, however, that provision is retained, we recommend that proposed Rule 37(c)(1) be modified so that the preclusion sanction is more discretionary. The proposed Rule mandates preclusion for any failure to disclosure that lacks substantial justification and is not harmless. Even if the failure does not satisfy those tests, preclusion may be too drastic a sanction -- for example, a negligent failure to disclose evidence critical to a party's case until after the close of discovery but significantly in advance of trial. This modest change would be consistent with the proposed amendment to Rule 11 emphasizing the need for flexibility in the selection of sanctions.

Pretrial Disclosures

The Section agrees in concept with subdivision (a)(3), which requires disclosure 30 days before trial of witnesses, exhibits, and certain other information. These disclosure requirements are already imposed in most cases by local rule or pretrial order.

The Section, however, questions the feasibility and usefulness of distinguishing between witnesses and exhibits that a party "expects" to present and those it "may" present.

The proposed Committee Note states that the latter are those witnesses or exhibits that "will be presented only if needed because of unanticipated developments during trial." It is likely to be difficult to identify witnesses and exhibits that may be necessitated by "unanticipated" developments. Moreover, as a practical matter, most counsel, out of caution, may list witnesses and exhibits as "expected," thus minimizing the benefit from separating "expected" from "possible" witnesses and exhibits.

Finally, the proposed rule provides that the filing deadlines in the rule would be superseded if a different time is specified by the court. The rule or the comment should make clear that the court can establish different deadlines either by order in a particular case or by local rule. For example, Rule 209 of the Rules of the U.S. District Court for the District of Columbia requires that trial witnesses and exhibits (in addition to other information) be listed in a pretrial statement to be filed not less that eleven days before the final pretrial conference.

Informal Resolution of Discovery Disputes

Proposed Rules 26(c), 37(a)(2), and 37(d) would require that motions for a protective order, to compel, or for sanctions be accompanied by a certification that the movant in good faith has conferred or attempted to confer with the opposing party to attempt to resolve the matter without court action. We support such a requirement, which

is not uncommon under local rules in federal courts and in state court rules.

Depositions

We support the proposed presumptive limit in Rule 30 on the number (10 per side) and length (6 hours) of depositions. We suggest that the Rule or the comments clarify how the limit would apply to defendants filing cross-claims or third-party claims. Would a defendant filing a cross-claim or third-party complaint be limited to the ten depositions permitted to defendants, or would it be permitted an additional ten depositions in its capacity as cross-claimant or third-party plaintiff? In many cases the issues raised by a cross-claim are tied closely enough to the issues raised by the underlying complaint that a cross-claimant would not need an additional ten depositions. However, because this might not be the case with a third-party complaint, consideration should be given to providing in the Rule for additional depositions for third-party plaintiffs, especially since third-party defendants are permitted ten depositions.

Interrogatories

We support a limit in Rule 33 on the number of interrogatories, but recommend that the limit be increased to 30 or 40 interrogatories. A limit of 15 interrogatories is too low, particularly in light of the ambiguity of what

constitutes a "subpart." For comparative purposes, we note that the District of Columbia Superior Court Civil Rules permit 40 interrogatories, and that the Local Rules of the U.S. District Courts for the District of Maryland and for the Eastern District of Virginia each permit 30 interrogatories.

SUMMARY ADJUDICATION

Although the proposed amendments would substantially revise the language of Rule 56, most of the revisions would simply make that language consistent with actual practice and with developments in the case law. The Section generally endorses these revisions. We offer comments on two aspects of the proposal.

First, subsection (c) of the revised rule would require that the motion for summary adjudication "recite, in separately numbered paragraphs, the specific facts asserted to be not genuinely in dispute." This is very similar to the requirement found in many local rules that has become a fairly standard part of summary judgment practice. Under most local rules, however, the statement of facts as to which there is no genuine dispute is ordinarily a filing separate from the motion itself. See, e.g., Local Rule 108(h) (D.D.C.) (motions for summary judgment to "be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue"). Such statements are often quite lengthy. Further, in many districts, either by rule or practice, legal memoranda or points and authorities

in support of a motion are placed in a document separate from the written motion, and the motion itself is relatively cursory.

We see no reason why the Federal Rule should mandate that the factual recitation be part of the motion, thereby requiring a departure from established practice in many districts. Accordingly, we recommend that the rule be amended to provide that the recitation of specific facts asserted to be not genuinely in dispute may be submitted either in the motion, the supporting memorandum, or in a separate statement of facts.

Second, subsection (g) of the revised rule is a new provision entitled "Conduct of Proceedings." It provides, in part, that the court "may conduct a hearing to . . . receive oral testimony to clarify whether an asserted fact is genuinely in dispute." The Committee Note states that the purpose of such testimony would be "to clarify ambiguities in the submitted materials -- for example, to clarify inconsistencies within a person's deposition or between an affidavit and the affiant's deposition testimony." According to the Note, the evidentiary hearing would be held "not to allow credibility choices between conflicting evidence but simply to determine just what the person's testimony is." The Note states that the new authority under subsection (g) would not "supplant" the existing authority under Rule 42(b) to hold hearings on issues that involve credibility and weight of evidence.

We are concerned that the revised rule does not sufficiently constrain the court's limited authority in the summary adjudication context. In contrast to Rule 42(b) hearings, it will be very difficult in the Rule 56 context for a court to draw the fine line between making credibility choices and merely deciding "just what the person's testimony is" in an oral hearing under new Rule 56(g). We therefore suggest that the fourth clause in proposed Rule 56(g) be deleted.

EXPERT WITNESSES

We generally support the proposed changes dealing with testimony by expert witnesses in Rules 16 and 32 of the Federal Rules of Civil Procedure and Rules 702 and 705 of the Federal Rules of Evidence. A principal purpose of the proposed changes in the Federal Rules of Evidence is to limit the unnecessary or unduly expensive use of experts. We believe that this proposal represents a reasonable attempt to achieve the goals of restraining the expanding use of expert witnesses and securing the just, speedy and less costly resolution of litigation.

The requirement in proposed Rule 26(a)(2) that experts provide a detailed report about their expected testimony, if enforced by the courts, should result in some reduction to the need to take depositions of expert witnesses. The practical benefit of this approach is enhanced by the provision in proposed Rule 26(a)(2)(C) expressly autho-

rizing courts, by local rule or orders in particular case, to alter the type or form of disclosure. However, the rule should specify whether or not drafts of these required reports are discoverable. There are substantial arguments for and against discoverability, and the issue should be addressed in the rule, rather than left for case-by-case adjudication.

We suggest the following modification of proposed Rule 32(a)(3)(D), which would permit the use of the deposition of an expert witness without having to establish the expert's unavailability. Use of such depositions at trial regardless of the expert's availability is appropriate provided that two conditions are satisfied. First, the party that intends to use the deposition at trial should provide notice before the deposition of that intent. Second, any party against which the deposition would be used should have an opportunity, within the time provided by rule or by order, to take a discovery deposition before the deposition that is expected to be used at trial.

These conditions are necessary because the relaxation of admissibility of expert depositions would tend to require every expert deposition to be conducted as a de bene esse deposition. With witness unavailability eliminated as a requirement for admissibility, a party that deposes the opposing expert would be exposed to use of the deposition at trial at the sole discretion of the opposing party. The party whose expert witness has been deposed -- at the oppo-

nent's expense -- might be willing to avoid the expense and uncertainty of producing the witness at trial by using the deposition. As a practical matter, de bene esse depositions are substantially different from discovery depositions. The two conditions that we suggest in the preceding paragraph would achieve two purposes: they would give the parties fair notice that the deposition should be conducted as a de bene esse deposition; and they would permit the opportunity for discovery of the expert before taking the deposition in a manner suitable for use at trial.