SUMMARY OF REPORT

On July 9, 1985, the United States District Court for the District of Columbia published for comment a set of extensive proposed revisions to its local rules governing general, civil, and criminal matters and bankruptcy proceedings. See 113 Daily Wash. Law Rep. 1377 (July 9, 1985). The proposed revisions were initially drafted by the court's Advisory Committee on Rules chaired by Jacob A. Stein.

The Committee on Court Rules of Division IV has prepared a report commenting on those portions of the revisions that propose significant changes to the current general and civil rules. The Rules Committee has not addressed the proposed revisions to the rules in the criminal and bankruptcy areas.

The committee's report generally endorses the court's efforts to substantially reorganize and streamline its local rules. Although many of the revisions are stylistic, there are a number of proposed revisions that are substantive or otherwise significant. The committee has endorsed many of these changes, although with suggestions for clarification or modification. It has opposed a few others. The committee's position regarding the significant proposed revisions is summarized below. All rule numbers refer to the new numbering system of the proposed rules.

Rule 104: This proposal would alter the court's long-standing practice of allowing attorneys in Virginia and Maryland counties contiguous to the District of Columbia to appear and practice in the District Court without joining resident counsel. The committee opposes the proposal as unnecessarily anticompetitive.

Rule 106: The committee endorses the proposal to prohibit parties and their attorneys from directing correspondence to a judge in a pending case. The committee opposes a proposed simplification to the current local rule regarding verification of pleadings as inconsistent with the governing statute.

Rule 107: This rule would authorize the District Judges to order that all or portions of discovery materials in particular cases not be filed with the Clerk. The committee unanimously opposed the rule as encouraging a non-uniform practice among the judges of the court. A majority of the committee favored a continuation of the present practice calling for the filing of all discovery materials. A minority favored a uniform rule of nonfiling of discovery materials.

Rule 108: The committee recommends some clarifications and modifications to this proposed rule on motions.

Rule 109: A majority of the committee endorsed this new rule requiring the filing of statements disclosing corporate affiliations and financial interests.

Rule 115: The committee generally endorsed this restatement of the current rule dealing with communications with jurors, but urges the court to eliminate the requirement for specific leave of court to speak with members of the jury following discharge.

Rule 116: The committee recommends further clarifications to this rule pertaining to bonds and sureties.

Rule 205: The committee generally endorses this significant revision of the present rule regarding temporary restraining orders and preliminary injunctions, but proposes certain modifications and clarifications to the proposed rule.

Rule 207: The committee urges that the rule pertaining to interrogatories and requests for admissions or production of documents be modified to require consultation between counsel prior to the filing of discovery-related motions.

Rule 212: The committee recommends a clarification to this rule regarding custody of exhibits in civil cases.

Rule 214: The committee endorses this new rule relating to taxation of costs. The committee, however, makes a number of recommendations for improvements in the language of the proposed rule.

Rule 215: The committee endorses this new rule concerning determination of attorneys fees in the District Court, but proposes a clarification.

REPORT OF THE COMMITTEE ON COURT RULES OF DIVISION IV OF THE DISTRICT OF COLUMBIA BAR COMMENTING ON PROPOSED CHANGES TO THE LOCAL RULES OF THE D.C. DISTRICT COURT

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"The views expressed herein represent only those of Division IV: Courts, Lawyers, and the Administration of Justice of the D.C. Bar and not those of the D.C. Bar or of its Board of Governors."

INTRODUCTION

The United States District Court for the District of Columbia has invited comment on a proposed comprehensive revision to the existing Local Rules. The Committee on Court Rules of D.C. Bar Division IV (Courts, Lawyers, and the Administration of Justice) is pleased to present this report commenting on those portions of the revision that propose significant changes to the current general and civil rules (Titles I and II of the Proposed Rules).*/ Because other divisions of the Bar have special expertise in criminal and bankruptcy practice, we have not commented upon the proposed revisions to the rules in those areas (Titles III and VI of the Proposed Rules).

The Committee applauds the efforts of the Court and its advisory committee to streamline and reorganize the Local Rules. We also endorse many of the proposed clarifications and substantive revisions to the existing rules. Generally, we believe that the proposed changes will make an important contribution to the efficient administration of justice by and in the District Court. We do, however, oppose a few of the proposed revisions.

Our comments fall into three categories. In many cases (Proposed Rules 106(d), 108, 115, 116, 205, 207, 212, 214 and

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*/ The Rules Committee wishes to thank Betty M. Orr, who assisted the Committee as an informal liason with the Clerk of the Court during the preparation of this report.

215), we generally agree with the proposed revision, but offer suggestions for clarification, modification, or further revision. In a few cases (Proposed Rules 106(b), 109, 201, 204), we simply offer comment on significant revisions which the committee endorses. Finally, we have opposed the revisions contained in Proposed Rules 104, 106(g) and 107. (We have not commented on a number of proposed rules in which the revision of the existing rule was purely stylistic or otherwise not significant.)

The Committee's views were not unanimous in all cases. Where there was a significant minority view, that view is also noted in the body of the comment.

PROPOSED RULE 104

Proposed Rule 104 (Practice By Attorneys) is largely a restatement, with changes in language, of present Rule 1-4(a). There are two substantive changes in the rule. The first is a new provision "making clear that attorneys who are not members of this Court's bar are subject to its discipline when they appear in an action." Comment to Rule 104. This clarification (set forth in Proposed Rule 104(h)) apparently is in accord with current understanding and practice. The other substantive change from the current rule relates to practice by non-resident counsel who are members of the Court's Bar and is one of the most noteworthy changes proposed by the new rules.

Rule 1-4 currently provides that an attorney who is a member of the Bar of the District Court may appear and practice in the Court, without joining local, resident counsel, if he or she

> maintains an office in a contiguous area in whose courts a member of the Bar of this Court who is also a member of the bar of the highest court of the state in which the contiguous area is located is permitted to appear, file pleadings and practice without being required to join of record an attorney having an office in the contiguous area . . . .

Rule 1-4(a)(1). "Contiguous area" is not defined by Rule 1-4, although Rule 4-1 (admission to the bar) currently defines contiguous areas as the counties of Arlington and Fairfax and the City of Alexandria. (Prior to May 1985, Rule 4-1 had also defined Prince Georges and Montgomery Counties in Maryland as contiguous areas. In May, however, both Rule 1-4 and 4-1 were amended to provide that attorneys who maintain an office in Maryland and have satisfied the "trial certification" requirements of the District Court for the District of Maryland may be admitted to appear and practice in our Court without local counsel. Accordingly, the Maryland "contiguous area" provisions were deleted.)

The "reciprocity" provision -- under which attorneys maintaining offices in contiguous areas may practice in the D.C. District Court without local counsel so long as the "courts" in that "area" afforded similar privileges to attorneys practicing

in the District -- has been a longstanding feature of Rule 1-4(a)(1). Nonetheless, it appears that the Clerk's office has in practice implemented the contiguous area rule without regard to reciprocity. For example, the Clerk's local rules supplement summarizes the present practice rule without reference to the reciprocity requirement, stating simply: "In other words, an attorney must not only be a member of the Bar of this Court, but must also maintain an office either in the District of Columbia or in a contiguous area to Washington, D.C." Supplement to the Local Civil Rules, at 2 (June 1984 revision).

Thus, until May 1985, the actual practice appears to have been that attorneys who maintained an office in any of the counties contiguous to the District of Columbia or in the City of Alexandria could practice in the D.C. District Court without joining local counsel. Under the May 1985 amendments to the rules, an attorney who maintains an office in Maryland is eligible to become a member of the D.C. District Court Bar and practice without local counsel if he or she is a member of the Bar of the United States District Court for the District of Maryland and complies with that court's local rule relating to certification of trial experience. The practice with respect to Virginia attorneys remains the same.

The comment to Proposed Rule 104 states: "The former provision allowing practice in this court by attorneys residing in 'contiguous areas' that allow reciprocity to D.C. attorneys

has been deleted, because it has been in effect for 15 years and no 'contiguous areas' have granted the reciprocity that would trigger its effect." The comment appears to assume that the contiguous area "exception" to the resident counsel requirement that is presently in the rule has been a nullity because of the absence of reciprocity. In fact, it appears that the Clerk's Office either has assumed that neighboring jurisdictions have afforded D.C. attorneys reciprocity or has ignored the reciprocity "trigger" of the rule.

There is some ambiguity as to how the present rule should be interpreted. The Virginia state courts permit attorneys who maintain offices only in the District, but who are members of the Virginia Bar, to practice without joining local counsel. Both the United States District Court for the Eastern District of Virginia and the Maryland state courts, on the other hand, require local, resident counsel. The United States District Court for the District of Maryland only recently began to permit D.C. Bar members without offices in Maryland to become members of that court's bar and to appear and practice without local counsel, so long as the D.C. Bar member satisfies the trial certification requirement. Given the difference between the "reciprocity" afforded by the state and federal courts in Virginia, the technical effect of present Rule 1-4 is unclear.

Whatever the precise meaning of the rule as presently worded, it is clear that Proposed Rule 104 would work a

substantial change in actual practice. Virginia lawyers in contiguous areas would be prohibited from practicing in this Court without joining local counsel and Maryland lawyers in the contiguous areas would be required to join the Bar of the District Court for the District of Maryland and satisfy that court's trial certification requirement before being permitted to practice without resident counsel in the District.

The Court Rules Committee reluctantly opposes the proposed change. Although we deplore the failure of certain courts in the contiguous areas to grant full reciprocity to attorneys practicing in the District, we view the proposed change as both anti-competitive and unnecessary to satisfy the Court's legitimate interests underlying the resident counsel requirement. We urge the Court to communicate with the courts in the areas having restrictive practice limitations to request that those courts revisit this question in light of current circumstances and the increasing uniformity of federal practice.

We do not believe that an attorney whose office is located in the Washington metropolitan area, but outside the boundaries of the District of Columbia, is significantly less likely to be familiar with the rules and practices of this Court than is counsel resident in the District. Nor do we believe that logistical requirements (e.g., for face-to-face conferences and hand delivery of papers among opposing counsel) are substantially more difficult to effectuate between attorneys located in the

District and its neighboring counties than between two widely separated points within the District. Finally, as the drafters themselves recognize in their proposed clarification concerning attorney discipline, all attorneys who appear before the Court are subject to its discipline. See Proposed Rule 104(h). It is also unlikely that the adoption of a "hard line" position on requirements for local counsel will prompt changes in the well-entrenched practices of the United States District Court for the Eastern District of Virginia.

Accordingly, the Committee believes that the proposed change in current practice would unnecessarily restrict competition and burden clients who prefer to use Maryland or Virginia counsel for litigation in the District. We urge, however, that the present rule be clarified to reflect actual practice.

PROPOSED RULE 106

Proposed Rule 106 (Form and Filing of Pleadings and Other Papers) is substantially similar to current Rule 1-5. There are three changes of some significance, each of which is discussed below.

Subsection (b). The proposed rule contains an entirely new provision prohibiting parties or their attorneys from directing correspondence to a judge. The Committee endorses inclusion of this prohibition in the proposed rule. Although many attorneys consider it bad form, the use of letters to communicate with the

court on administrative matters concerning pending cases is fairly widespread. Even when all parties are copied on such correspondence, there are no formalities of filing and service and the communication is neither docketed nor included in the formal record of the proceeding. Further, it is difficult to draw a line between routine, administrative communications, which might unobjectionably be stated in a letter in certain circumstances, and other communications, such as requests for continuances or enlargements of time, which obviously should be made by motion or otherwise placed on the formal record of the proceeding.

The new provision does not address the related subject of oral communications with a judge or law clerk. Several members of the Committee view the proposed rule as properly addressing an administrative, recordkeeping problem arising from "off the record" written communications that does not exist with respect to oral communications. To the extent that oral communications raise issues concerning ex parte contacts with the Court, those members believe that the issue is more appropriately addressed as a matter of ethical standards of the Bar and the Judiciary rather than in a local rule. Other Committee members, however, believe that oral communications pose a problem even more significant than that of correspondence because of the greater potential for abuse and ex parte communications on the merits. They would urge

the Court to study the matter with a view towards promulgating a further revision to the Rule.

Subsection (d). The new Rule requires that all papers signed by an attorney contain, in addition to name, address, and telephone number, the bar identification number of the attorney. This requirement already exists in the D.C. Superior Court and many attorneys already include their bar numbers on papers filed in the District Court. The Committee endorses the change, which is being proposed to facilitate a computerization of the Clerk's office records.

The Committee notes that some attorneys permitted to practice and sign papers without resident counsel may not be members of the D.C. Bar and therefore will not have a bar identification number. The Committee suggests that the Court consider clarifying the proposed rule to indicate that a bar number is required only of resident counsel and that Maryland attorneys who practice pursuant to Proposed Rule 104 and who are not members of the D.C. Bar should use their Maryland Trial Bar identification numbers. We also urge that the Clerk not refuse to file papers subsequent to the first pleading or other filing that does not contain the bar identification number, so long as the first-filed paper conformed to the rule.

Subsection (g). A simplified version of current Rule 1-6 (verification of pleadings) would become a subsection of Proposed Rule 106. The verification of pleadings rule implements 28

U.S.C. § 1746 providing for unsworn declarations under penalty of perjury in lieu of sworn (i.e., notarized) statements. The present rule is largely a verbatim repetition of the statute. Proposed Rule 106(g) consists of a much shorter, simpler paraphrase of the statute.

The Committee believes that the proposed rule sacrifices precision and necessary tracking of the statute for the sake of brevity. For example, the statute contains two forms of declaration under penalty of perjury, one for execution outside the United States and the other for execution within the United States. The proposed rule sets forth only the "without the United States" form and suggests its general use. Although the two forms are quite similar (the "without the United States" form contains the additional phrase that the declaration is made "under the laws of the United States"), the statute explicitly sets forth two different forms. Further, the statute states that the writing may be in the form of "unsworn declaration, certificate, verification, or statement." The proposed local rule simply states that the matter may be supported by "an unsworn written statement."

The Committee recommends that the wording of the current rule be retained in Proposed Rule 106(g). Another, but less satisfactory, alternative would be a rule containing a simple statement that the court encourages the utilization of statements under penalty of perjury in lieu of sworn statements where

permitted by and in accordance with the provisions of 28 U.S.C. § 1746. (By its terms, the statute does not require an implementing rule.)

PROPOSED RULE 107

Proposed Rule 107 (Filing of Discovery Requests and Responses) is obviously a compromise. The Comment to Rule 107 states that the Rule is "designed to recognize that the filing of discovery materials is often expensive and unnecessary." Yet despite the avowed desire to alter the present practice of filing all discovery materials, the Rule largely perpetuates that practice, while apparently permitting individual judges to adopt standard non-filing rules in all cares assigned to them. Because of the differing views within the Court on this question, such a provision may result in "standard" filing requirements varying among chambers, creating the inevitable confusion that results from non-uniform practices. The Committee was unanimous in its view that a uniform rule either requiring or prohibiting filing of discovery material except in exceptional cases would be superior to the proposed rule.

A majority of the Committee favors a continuation of the present practice of filing all discovery materials. There are other important interests in retaining the current public filing requirements. In a case that arose in this District, the Supreme Court held that the public has a common law right of access to

court records, including materials filed in the Clerk's Office. Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978). In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), and its progeny, the Court has held that the public also enjoys a First Amendment right to attend trials and other courtroom proceedings, a ruling which some courts have extended to assure access to many court records as well, e.g., Brown & Williamson Tobaccco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983).

Continued access to discovery materials is important to the public, the press and the bar. Most cases never get to trial, and access to discovery materials and other records on file with the Clerk provides an important means of understanding how cases are actually litigated and what the facts may be in a given controversy. These records provide an invaluable source of data not only to journalists, but also to members of the bar who may be handling similar cases. Access to data from a previous case can simplify and expedite subsequent litigation regarding the same issue. For these reasons, proposals to limit filing of discovery materials should be examined with great care. While the Committee understands and respects the concerns of the Clerk's Office about the volume of materials on file there, the Committee believes that the current presumption of mandatory filing in Rule 5 of the Federal Rules of Civil Procedure should be maintained.

Moreover, some of the specific provisions of the proposal are problematic. For instance, the Rule seems to contemplate that a non-party can move to have materials filed in a case. As a practical matter, journalists or lawyers may not be aware of a given case or its significance to them until several years after it is over. We question whether at that stage, the District Judge would order the parties to re-assemble discovery materials and file them. Although this is apparently a compromise proposal, it is likely to offer very little practical relief.

A minority of the Committee favored uniform non-filing of discovery materials in order to relieve the burden such materials create in the Clerk's Office.

PROPOSED RULE 108

Most of the provisions of Proposed Rule 108 (Motions) are identical to current Rule 1-9 or represent merely stylistic changes from that Rule. Some of the provisions of the proposed rule, however, warrant comment:

Subsection (a). This provision makes a sensible stylistic change from Rule 1-9(b), clarifying that a table of cases is not required in every memorandum of points and authorities. The Committee, therefore, supports the new provision.

Subsections (b) and (c). The proposed rules delete the requirement that an opposition memorandum must be accompanied by a proposed order. It would seem that the rationale behind

requiring that a proposed order accompany a motion applies with equal force to an opposition. The Committee, therefore, recommends that the requirement that a proposed order be filed with an opposition be retained in the proposed rule.

Subsection (f). The deletion of the ten-minute limit on arguments appears justified in view of the present practice of most Judges of the Court to regulate the time of argument based on the particular nature and the circumstances of the motion before them. The change in the provision applicable when the moving party fails to appear for argument also appears appropriate. By permitting the Court to treat the motion as withdrawn, the proposed rule gives more equal treatment to both parties, inasmuch as a party opposing the motion who fails to appear may be deemed to have conceded the motion.

Subsection (h). As a matter of style, and to avoid confusion, it would appear that the next to last sentence (regarding memoranda supporting or opposing a motion for summary judgment) should more appropriately read:

> Each such motion and opposition must also contain or be accompanied by a memorandum of points and authorities required by sections (a) and (c) of this rule.

(Proposed additional language indicated by underlining.)

The additional language proposed by the Committee would make this provision consistent with subsection (a) of this same rule and indicate that a memorandum of points and authorities, separate from the motion or opposition, is appropriate.

The last sentence of proposed subsection (h) is merely a stylistic revision of the last sentence of Rule 1-9(i) and represents a valid and beneficial procedure for ruling on motions for summary judgment. Recent rulings of the United States Court of Appeals for the District of Columbia Circuit have questioned whether a motion can be granted without a full review of the record based on technical deficiencies in the statement of facts in opposition to the motion. See, e.g., Catrett v. Johns-Manville Sales Corp., 756 F.2d 181 (D.C. Cir. 1985). The Committee believes, however, that the principles set forth in Catrett do not apply directly to the situation dealt with in the last sentence of subsection (h). Indeed, the decisions make it clear that a party moving for summary judgment has the burden of establishing the absence of a material issue of fact, while subsection (h) provides that, once such a showing has been made by the movant, the opposing party must properly designate the facts it deems in dispute or be deemed to have admitted movant's contentions. See, e.g. McKinney v. Dole, 765 F.2d 1129, 1135 (D.C. Cir. 1985). Because the last sentence of subsection (h) is not inconsistent with the case law and because it reflects a beneficial procedure, it should be retained in the Rule.

Subsections (i),(j) and (k). These subsections (relating to motions to amend pleadings, motions to intervene, and petitions for removal) are all new provisions not included in Rule 1-9 or elsewhere in the Local Rules. According to the

comments to the proposed rule all three were added at the suggestion of the Clerk, and all appear to embody sound procedures.

In particular, the Committee feels that subsection (i) reflects a practical approach to motions to amend. By requiring the motion to be accompanied by the proposed amended pleading and by deeming said pleading filed as of the date of the order granting leave to amend, the proposed rule eliminates the cumbersome and often neglected requirement that a party actually file the amended pleading after the order is signed. Under the proposed rule, the pleading to be amended is already in the file when the order granting leave to amend is entered, and, since it is deemed filed upon the signing of that order, nothing further is required of counsel or the Clerk.

We note, however, that the rule creates some potential for confusion with regard to the time for responses to amended pleadings. Under Rule 15(a) of the Federal Rules, the time for such responses ordinarily runs from the date of service of the amended pleading. It is probably unrealistic to expect the proponent of the amended pleading to reserve the pleading after it is "deemed" filed. Therefore, the Committee suggests that the rule include the following additional language: "For purposes of a party's response to an amended pleading under Federal Rule 15(a), the amended pleading is deemed served by mail on the date on which the order granting the motion is filed."

The Committee endorses this proposed change as eliminating wasted time and paperwork. For the same reasons, subsection (j) (proposing a similar practice for motions to intervene) also received the Committee's support.

Although supporting the language of proposed subsection (k), the Committee questions whether the subsection, dealing with petitions for removal, relates to motions practice, as does the remainder of the proposed rule. The Committee suggests that the subsection be made a separate rule with its own title.

PROPOSED RULE 109

Proposed Rule 109 (Disclosure of Corporate Affiliations and Financial Interests) is a new Rule. Such a statement by a corporate party or intervenor has never been required before. The Committee has no objection to the form of the Rule, since it basically tracks the form of Rule 8(c) of the United States Court of Appeals for this Circuit. A majority of the Committee believes that there is a need for this Rule to assist the Court in making its recusal determinations. In particular, such a rule would help lessen the chances of a judge having to recuse him or herself after having spent a great deal of time and effort on a particular case. Revealing complete information at the beginning of an action would help to prevent late recusals based on information concerning corporate affiliations that is not apparent from the face of the pleadings.

A minority of the Committee questioned the need for the rule, particularly because the Court has apparently operated effectively without it in the past. The rule would create an additional paperwork burden for parties and may even result in recusals for reasons having nothing to do with a judge's ability to fairly try a case. The Court is presently put on notice of the corporate identity of a party and, if concerned about the possibility of a conflict, can ask that party for additional information. Unlike the judges on the Court of Appeals, the trial judge deals with a case on a regular basis from its inception. For that reason, the minority believed that a requirement for a formal certificate was not necessary.

PROPOSED RULE 115

Proposed Rule 115 (Communication with a Juror) is a restatement, without significant change, of current Local Rule 1-28. The proposed rule makes clear, however, that neither a party nor anyone acting on behalf of a party, as well as an attorney, may communicate with a juror during trial. Moreover, the Rule, as the comment states, gives the Court greater flexibility in overseeing communications with a juror after a verdict is entered and the juror is discharged.

The Committee notes, however, that Proposed Rule 115(a) does not deal with communications, before a verdict, with excused jurors, a practice the Court of Appeals has found to be "wholly

improper." Hobson v. Wilson, 737 F.2d 1, 47, n.141 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 1843 (1985). We suggest, therefore, that Proposed Rule 115(a) be amended to read:

> No party, attorney for a party, or person acting on behalf of a party or attorney, shall communicate directly or indirectly with a juror or an excused juror or a member of a juror's, or an excused juror's, family during the trial.

(Proposed additional language indicated by underlining.)

With respect to Proposed Rule 115(b), a majority of the Committee believes that, after a jury is discharged, there should be no need for an attorney or party who wishes to speak with members of the jury to request leave of the court. There is no similar requirement for members of the public or press. Instead, the Court should advise the jury that no juror is required to speak to anyone and that a party or an attorney should re-advise members of the jury of that advice if he or she wishes to speak to the discharged juror. The Committee believes that appropriate post-discharge communications between attorneys and jurors play an important role in the attorney learning process.

PROPOSED RULE 116

Proposed Rule 116 (Bonds and Sureties) seeks to clarify the requirements for obtaining approval of bonds and sureties by attempting to compile in one location all of such approval requirements. However, the proposed rule contains no provision with regard to cash undertakings. The experience of the members

of the Committee is that there are circumstances under which cash undertakings are appropriate or even necessary. Accordingly, the Committee recommends the following amendment to the proposed rule:

> Any bond or undertaking required in a proceeding must be approved. If the order approving a bond or undertaking is consented to or the surety is a corporation holding authority from the Secretary of the Treasury to do business in the District of Columbia and having an agent for service of process therein, or the undertaking is in cash or a cash security, the order may be entered by the Clerk.

(Proposed additional language indicated by underlining.)

The proposed rule also fails to refer to the practice, described in the Supplement to the Local Civil Rules, at 21, but not previously set forth in the Local Rules themselves, whereby:

> An attorney may not sign an injunction undertaking or bond on behalf of the client unless he/she attaches to the undertaking or bond a Special Power of Attorney executed by the client which appoints counsel as his/her Attorney-in-Fact for the explicit purpose of executing that undertaking or bond in that amount for filing in a certain case.

If this practice is to continue, it should be set forth in the Local Rules. If this practice is to be discontinued, the comment should specifically say so. Otherwise, even the most diligent attorney will not be certain what is required. As a general matter, it is quite undesireable to have Court practice requirements that are not explicitly set forth in the Rules themselves. Compliance with the Court's requirements is

significantly hampered to the extent there are expectations not set forth in the Local Rules.

PROPOSED RULE 201

Proposed Rule 201 (Entry and Withdrawal of Appearances by Attorneys in Civil Actions) is quite similar to current Rules 1-4(b) and (c). Two changes are proposed. First, an attorney may make an appearance by filing an "entry of appearance" or by signing a "pleading" as defined in Federal Rule 7(a) (i.e., a complaint, answer, counterclaim, reply to a counterclaim, etc.) rather than any "paper," as provided for in the current rule. The complexity of cases in this District results in the filing of numerous "papers," often involving multiple parties, so that all attorneys who have made appearances as currently defined may be difficult to determine. The Committee favors this change which, in fact, corresponds with the better practice already utilized by many attorneys in the District.

PROPOSED RULE 204

Proposed Rule 204 (Habeas Corpus Petitions, Section 1983 Complaints, and Section 2255 Motions) should ease the often burdensome task of administering the numerous pro se complaints originating from the D.C. Jail and Lorton Reformatory. The unstated obligation imposed upon the institutions specified is that the forms described in this proposed rule be made available

to inmates, and that Section 1983 claims filed without use of the proper form be returned to the inmate/plaintiff, accompanied by copies of the blank form with instructions on the form's use. The proposed rule should not be administered in such a way as to deprive any aggrieved party of the opportunity to have potentially legitimate claims heard. For example, motions or petitions not filed on the standard form in accordance with the rule should be treated in a way that will not prejudice the filer for purposes of the statute of limitations or other time limits.

PROPOSED RULE 205

Proposed Rule 205 (Temporary Restraining Orders and Preliminary Injunctions) adds a needed requirement with respect to applications for temporary restraining orders filed after business hours. The proposed rule would prevent "judge shopping" by encouraging prior notification of the Clerk's Office during business hours when it is anticipated that such an application will be filed. The Rules Committee supports such a requirement as well as the proposed penalty (refusal to hear the matter on an emergency basis) for unexplained non-compliance.

Proposed Rule 205 also provides needed regulation of the use of affidavits and live testimony on applications for preliminary injunctions. The Committee supports regulation of such applications by resort primarily to the use of affidavits. The proposed rule states that preliminary injunction motions

ordinarily will be decided without live testimony. Because the proposed rule leaves open the opportunity for the presentation of live testimony, the Committee suggests that any party wishing to offer such testimony provide the court, in addition to the list of witnesses to be examined, a brief statement of the testimony expected to be elicited. This will afford opposing counsel the opportunity to assess whether he or she should be prepared to present live testimony in rebuttal and the scope of that testimony. Moreover, recognizing the difficulty in ensuring the availability of rebuttal witnesses on short notice, the Committee suggests that the last sentence in Proposed Rule 205(d) provide for at least two, rather than one, days notice of the Court's ruling on the testimony. The Rule would read as follows: "If practicable, the court shall notify all parties of its ruling on the request to adduce live testimony at least two business days before the hearing." (Proposed additional language indicated by underlining.)

The Committee does not understand the usefulness of providing in Proposed Rule 205(d) for a written request for permission to cross-examine a witness seventy-two hours before a scheduled hearing on an application for a preliminary injunction. If the requirement is intended to encompass those situations where a litigant seeks to cross-examine affiants, then the proposed rule should so state. Otherwise, if the Court has already decided that a party can offer live testimony, there does

not appear to be any basis for precluding an opposing party from cross-examining the witnesses who will be called. And, if there has not yet been a request to present live testimony made or granted, a request to cross-examine, except as to affiants, is meaningless. Thus, the requirement in that regard should be eliminated from the proposed rule or clarified.

PROPOSED RULE 207

Proposed Rule 207 (Form of Interrogatories and Requests for Admissions or Production of Documents) effects a simple and unobjectionable modification to an existing Rule, i.e., to add requests for production of documents to the discovery requests that require the responding party to quote the request along with the response.

The proposed rule contains no requirement, as exists in many jurisdictions (see, e.g., E.D. Va. Rule 11-1(J); D.C. Superior Court Rule 37(a)), that parties attempt to reconcile discovery disputes before moving the Court for assistance. Such a requirement would encourage parties to administer discovery cooperatively and without the need for Court intervention, as is generally encouraged under the Federal Rules of Civil Procedure.

Because of potentially beneficial effects of such a requirement, and because of the desireability of uniformity between D.C. Superior Court and district court practice, the

Committee favors adoption of a requirement, similar to (but broader than) that now in effect in D.C. Superior Court Rule 37(a), that all motions regarding discovery be accompanied by a certification that, despite a good faith effort, the movant has been unable to obtain the discovery sought. Indeed, because discovery should be as cooperative a venture as possible, such consultation is appropriate for all discovery matters, including motions for enlargement of time, for a protective order, and for all other matters for which a court order is necessary.

The Committee therefore recommends the following additional language for Proposed Rule 207 (previously recommended by the Committee in its August 10, 1982 "Report of the Committee on Court Rules of Division IV of the District of Columbia Bar Regarding Proposal for New Rules for the United States District Court"):

> No motion concerning discovery matters may be filed until counsel for the moving party shall have consulted with opposing counsel regarding the possibility of resolving the discovery matters in controversy. All motions concerning discovery matters must contain or be accompanied by a signed statement of counsel for the moving party that a good faith effort has been made to resolve the discovery matters at issue.

A minority of the Committee believes that the Rule should also specify a limit (similar to that now enforced in Superior Court Rule 33(a)) to the number of interrogatories one party may serve on another. However, a majority of the Committee opposed the insertion of such limits on the grounds that the Federal

Rules of Civil Procedure already contain adequate safeguards against discovery abuse.

PROPOSED RULE 212

Proposed Rule 212 (Custody of Exhibits in Civil Cases) is essentially the same as current Local Rule 1-19 except that it requires that the parties file exhibits only when notified that the record is to be transferred, rather than when the appeal is noted. This change is a sensible one in view of the current practice of the Circuit Court not to require the transmittal of the record in many cases. There is, however, one portion of the rule which may lead to confusion. The proposed rule (and, indeed, the current rule) provides in the second sentence that "each party to the appeal" must file its exhibits with the Clerk (emphasis added). In the event of an appeal involving less than all parties to the action below, certain exhibits may have been introduced at trial by a party not involved on appeal. If such exhibits are necessary for inclusion in the record on appeal, the proposed rule appears not to require their filing.

Therefore, the Committee proposes that the above-quoted language be amended by deleting the words "to the appeal," and adding in its place "to the action in this court." Further, the rule should be amended to provide that the filing of exhibits by a party below who is not a party to the appeal shall only be

required upon the request of a party to the appeal. Thus, the Committee recommends that the rule read as follows:

> All exhibits offered by a party in a civil proceeding whether or not received as evidence, shall be retained after trial by the party or the attorney offering the exhibit, unless otherwise ordered by the court. In the event an appeal is prosecuted, each party <u>to the action in this court</u>, upon notification from the Clerk that the record is to be transmitted <u>and upon request of a party to the appeal</u>, shall file with the Clerk any exhibits to be transmitted as part of the record on appeal. Those exhibits not transmitted as part of the record on appeal shall be retained by the parties, who shall make them available for use by the appellate court upon request. Within thirty (30) days after final disposition of the case by the appellate court, the exhibits shall be removed by the parties who offered them. If any party, having received notice from the Clerk to remove exhibits as provided herein, fails to do so within thirty (30) days of the date of such notice, the Clerk may destroy or otherwise dispose of those exhibits.

(Proposed additional language indicated by underlining.)

PROPOSED RULE 214

Proposed Rule 214 (Taxation of Costs) is a new rule relating to the costs allowed pursuant to Federal Rule 54(d) and certain statutory provisions. At the request of the Clerk's Office, the Committee conducted an extensive study of the various court rules in other districts relating to the taxation of costs and the practices in this District. As a result of that study,

the Committee submitted a Report recommending a rule similar to that promulgated in this proposed rule.

The proposed rule is a substantial benefit in one major respect -- the proposal should allow for greater certainty and expeditious handling of requests for costs. This proposal does not resolve all the important questions on costs, such as defining the "prevailing party." Nonetheless, we support this proposal because the procedure will resolve most cases and is a critical first step.

The Committee has some recommendations for improving the language of the proposed rule which are set forth below.

Subsection (a). This subsection sets forth the procedure for submitting a bill of costs to the Clerk. In general, the Committee fully supports the language in this subpart. The Committee, however, believes that a bill of costs should be documented to allow the opposing party to determine whether any opposition to the requested costs is appropriate. The Committee suggests the following language be added between the current third and fourth sentences:

> The party shall attach all documentation necessary to support the requested costs, including, for example, copies of invoices. In the absence of specific documentation, an affidavit specifying and verifying costs shall be submitted. The party may submit a brief statement of points and authorities supporting the necessity of the requested costs and the reasons the costs should be taxed.

The Committee believes that, in the absence of documentation and explanation, the opposing party may argue it is necessary to take

discovery with respect to unexplained costs. The sentence allowing for a brief in support of the bill of costs is intended to allow (not require) such a brief only in cases where extraordinary costs are sought or where a question may exist as to who is the prevailing party.

With respect to the remainder of subsection (a), the Committee believes the requirement to file a bill of costs by one prevailing party, even though there is not a final judgment with respect to the remainder of the case, may lead to some initial confusion. The Committee suggests that, when this Rule is implemented, the Clerk take steps to advise parties who are dismissed early from a case that such party must file its bill of costs within twenty (20) days of that early dismissal even though a "final judgment" has not yet been entered.

Subsection (b). This subsection, which sets forth the procedure for opposing a bill of costs, is quite similar to the Committee's proposal and the modifications made are acceptable.

Subsection (c). This subsection sets forth the procedure and timing of the taxation of costs by the Clerk. The Committee assumes that even though a party must file a bill of costs after judgment as to each party, the Clerk will not rule until final judgment is entered or other arrangement is made. We believe the non-prevailing party should not be subjected to piecemeal assessments of costs. With that understanding, the Committee supports the modifications to the Committee's proposal.

Subsection (d). This subsection contains a listing of those costs which are allowable by the Clerk if properly included in the bill of costs. We support the language in subsections (d)(1) to (d)(7). With respect to subsection (d)(8), we disagree that the maximum copying costs allowable by the Clerk should be $300. The Committee believes that this amount is easily exceeded in almost every case in federal court. For this reason, the Committee believes that the current subsection (d)(8) should be deleted and two subsections (appropriately numbered) should be added as follows:

(8-1) costs of preparation, explication and copying of those exhibits which are introduced into evidence, are used for impeachment, or are filed with the Clerk;

(8-2) other costs of copying up to $300;

The Committee disagrees with the language of subsection (d)(9) as currently drafted. This subsection now allows a prevailing party to recover witness fees and travel and subsistence costs even for those friendly witnesses who could testify by deposition. For this reason, we suggest modifying subsection (d)(9) and breaking it into two (2) separate subsections (appropriately numbered) as follows:

(9-1) witness fees pursuant to 28 U.S.C. §1821(b) for each witness who appears and testifies;

(9-2) travel and subsistence costs pursuant to 28 U.S.C. §1821(c) up to 100 miles of each witness who appears and testifies;

The Committee supports the language in subsections (d)(10), d)(11) and (d)(12). The Committee believes, however, that additional language should be added to subsection (d) to cover removal costs. We therefore suggest the following language be added as subpart (d)(13):

> (13) any costs of the kind enumerated in this rule which were incurred in the District of Columbia courts prior to removal which are recoverable under the District of Columbia Court of Appeals and the Superior Court of the District of Columbia;

Subsection (e). The Committee believes that the language of subsection (e), which relates to the filing of a motion to retax costs, is somewhat confusing as to the timing of such a motion. The Committee believes the following language would better state the intent of the proposed rule:

> (e) A review of the decision of the Clerk in the taxation of costs may be taken to the court on motion to retax by any party in accordance with Rule 54(d), Federal Rules of Civil Procedure. The court, on a motion to retax, for good cause shown may tax additional costs or may deny costs allowed by the Clerk pursuant to Section (d). A motion to retax shall specify the ruling of the Clerk excepted to and no other costs will be considered, except that the opposing party may, within ten (10) days of service of the motion to retax, file an opposition and/or a cross-motion to retax.

In addition, the Committee would add a subsection (f) so that it may be clear how Proposed Rules 214 and 215 will operate together.

Proposed Subsection (f). It is the present practice before many of the Judges of this Court to permit the bill or requests for costs to be incorporated into a motion for attorneys' fees and expenses as contemplated by Proposed Rule 215. Because this procedure avoids duplication of effort and paperwork by counsel and the Court, the Committee recommends that it be permitted under the proposed rules. However, as Proposed Rules 214 and 215 now read, it would appear that such a joint motion for fees as well as costs can only be made within the twenty-day period set forth in Proposed Rule 214(a). If an attorney waits beyond that time and files a combined motion for attorneys' fees and costs under Rule 215, he or she risks having waived the claim for costs under Rule 214. The Committee believes that this situation may result in needless multiple filings with the Court and that it is inconsistent with the provisions in Rule 215(a) requiring the parties to confer regarding fee claims and setting a timetable for resolving the fee questions not limited by the twenty-day provision in Rule 214.

Therefore, the Committee recommends the adoption of the following subsection 214(f):

> (f) In a case in which the Court has, at the time of the entry of final judgment, entered an order pursuant to Rule 215(a), and in which a party wishes to present its claim for costs at the same time as its claim for attorneys' fees under Rule 215, the requirements of this rule shall not apply.

PROPOSED RULE 215

Proposed Rule 215 (Determination of Attorneys Fees), is a new Rule. It covers the post-judgment conference, determination of attorneys fees pending appeal, and interim awards.

Subsection (a) would require the parties to confer and attempt to reach agreement on fee issues. The Court is also required to order the parties to confer in an attempt to reach agreement and to set a status conference to determine whether agreement has been reached, enter judgment on the agreement, or set an appropriate schedule for completion of the fee litigation.

If an appeal is being taken by either party, the Court should consider this at the conference under Rule 215(b) and decide whether to hold the fee issues in abeyance pending the outcome of the appeal. The Committee notes that ruling on attorneys fees and costs prior to an appeal will sometimes avoid the delay of a second appeal on attorneys fees.

Subsection (c) states that Proposed Rule 215 does not preclude interim applications for attorneys fees prior to final judgment and does not apply to attorneys fees sought as sanctions under Rules 11 or 37 of the Federal Rules of Civil Procedure. It is unclear why Rules 16 and 26 were not referenced as excluded in Rule 215(c). They should be so referenced and the Committee suggests that the Proposed Rule be amended accordingly.

The Committee notes that a postjudgment request for an award of attorney's fees is not a motion to alter or amend the

judgment subject to the ten-day timeliness standard of Federal Rule of Civil Procedure 59(e). White v. New Hampshire Department of Employment Security, 455 U.S. 445, on remand, 679 F.2d 283 (1st Cir. 1982)(on remand, request found timely although made four and one-half months after the entry of the decree). However, a court may deny fees in a case in which a postjudgment motion unfairly surprises or prejudices the affected party. Id. The Court may enter final judgment on the merits before fixing the amount of attorney's fees. Laffey v. Northwest Airlines, Inc., 582 F. Supp. 280 (D.D.C. 1982). A number of districts have promulgated local rules which specify the time period for filing a motion for attorney's fees. E.g., District of Maryland Local Rule 23A (within 20 days of entry of judgment).

The Committee endorses Proposed Rule 215 as an enhancement of the current process. The Committee notes, however, that the Rule should not be interpreted to preclude or discourage a proper agreement on attorney's fees as part of a settlement or consent decree. Moore v. National Association of Securities Dealers, Inc., No. 83-2213 (D.C. Cir., June 4, 1985); see D.C. Bar Legal Ethics Opinion 147. It would also be helpful if the Rule clarified the District Court's post-appeal procedures regarding fees to be awarded for the appeal.