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LITIGATION SECTION

The District of Columbia Bar

BRIEF SUMMARY OF COMMENTS OF THE LITIGATION SECTION OF THE DISTRICT OF COLUMBIA BAR ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL RULES OF EVIDENCE

The Litigation Section of the District of Columbia Bar intends to submit comments to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States concerning several proposed amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. The proposed comments of the Litigation Section are different from comments submitted separately by the Section on Courts, Lawyers and the Administration of Justice.

FEDERAL RULES OF CIVIL PROCEDURE: The Section supports the proposed amendment to Rule 5. With regard to Rule 26, the Section supports the proposed amendment to Rule 26(a)(1), but suggests that a clarifying comment be added to the Committee Notes. The Section supports the limitations on discovery proposed in Rule 26(b)(2), except for the limitation on requests for admissions, which the Section believes is unnecessary. As to Rule 30, the Section believes that the existing ability of the courts to grant relief from abuse in depositions is adequate, and that the presumptive time limit of one day of seven hours would encourage delay.

FEDERAL RULES OF EVIDENCE: With regard to Rule 703, which deals with testimony by experts, the Section does not believe that any change in the current practice is necessary.

COMMENTS OF THE LITIGATION SECTION OF THE DISTRICT OF COLUMBIA BAR ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL RULES OF EVIDENCE

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has solicited comments on proposed amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. The Litigation Section of the District of Columbia Bar submits these comments on the proposals concerning filing of discovery materials, the standard for initial disclosures, time limits on depositions, the exclusion of inadmissible information forming the basis for expert testimony.[1]

FEDERAL RULES OF CIVIL PROCEDURE

Rule 5. Service and Filing of Pleadings and Other Papers.

The proposed amendment to Rule 5 would require that specified discovery materials are not to be filed with the court, unless they are used in the proceeding or unless the court orders filing. The Notes indicate that the proposed amendment is primarily a housekeeping matter, reflecting the widespread experience of the District Courts, which in many instances have adopted similar procedures in their Local Rules. The Litigation Section believes that the amendment promotes the goal of uniformity, and supports the proposed amendment.

Rule 26(a)(1). Initial Disclosures.

The proposed amendment would change the scope of the initial disclosures required under Rule 26(a)(1). The current Rule requires that a party produce information which is "relevant to disputed facts alleged with particularity in the pleadings." The proposed amendment requires that each party must produce information supporting "its claims or defenses, unless solely for impeachment."

The Section generally agrees that the proposed standard would be helpful in providing uniformity and in narrowing the scope of the material required to be disclosed. However, the Section believes that, in many cases, the proposed standard may be difficult to apply. First, whether a particular document or witness helps or hurts a party's case is not always clear at the outset of litigation, because the impact upon one's "claims or defenses" may depend on clarification of facts through the discovery process. Before discovery, and before the theme of the case is developed, it

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[1] The views expressed herein represent only those of the Litigation Section of the District of Columbia Bar, and not those of the D.C. Bar or its Board of Governors. The Litigation Section is comprised of approximately 2800 members.

may be difficult for the disclosing attorney to determine the significance of particular facts. Further, whether the testimony of a particular witness or a particular document supports a disclosing party's claims or defenses is often a question of strategy and legal judgment. In complex cases, the initial disclosure requirement in Rule 26(a)(1), combined with the exclusion sanction in Rule 37(c)(1), may be used as a sword to limit the opposing party's ability to put on its case, based on "20-20 hindsight" about what should have been disclosed at the outset. While Rule 26(a)(1) requires the parties to disclose only "information then reasonably available," that very limited qualification leaves open the distinct possibility of collateral litigation about the opposing counsel's exercise of professional judgment in deciding what to include in the initial disclosures. While the Litigation Section supports the goals of the proposed amendment, the Section suggests that the Committee Notes include an acknowledgment of the fact that the standard set forth in the proposed Rule may prove difficult to apply in complex cases, and recognizing that the parties should be accorded reasonable latitude in the good faith exercise of professional judgment.

Rule 26(b)(2). Limitations.

In the interest of uniformity, the proposed amendment would eliminate the ability of the District Courts to adopt local rules altering the limits in the Federal Rules on the number of depositions and interrogatories. However, the proposed amendment would allow the District Courts to continue to adopt local rules limiting the number of requests for admission pursuant to Rule 36. Allowing the District Courts to continue to impose limits on requests for admissions through local rules undercuts the goal of nationwide uniformity underlying the other changes to Rule 26. As the Committee Notes point out, the Federal Rules contain no numerical limits on requests for admissions, and there seems to be no particular reason to allow the District Courts to depart from that presumptive standard through local rules. The intent of Rule 36 is to streamline a case for trial by requiring parties to admit matters about which there is no dispute. It therefore appears that, except where the present rule is abused for the sake of harassment, limiting the number of requests for admission would be presumptively detrimental rather than beneficial. The Litigation Section believes that instances of abuse can be adequately handled through orders in particular cases.

Rule 30(d). Schedule and Duration; Motion to Terminate or Limit Examination.

As currently written, Rule 30(d)(2) states that the District Courts may, by order or local rule, limit the time permitted for the conduct of a deposition. The proposed amendment would impose a uniform limitation of one day of seven hours, unless otherwise authorized by the Court or stipulated by the parties and the deponent. The Litigation Section believes the practical effect of the proposed rule may be to encourage deponents and lawyers to engage in delaying tactics. In many instances, one day of seven hours may not be sufficient time to cover the necessary material with an important witness. It is generally difficult to tell in advance how long a deposition will take, because the time depends as much on the deponent's answers as it does on the nature of the questions. The Litigation Section suggests that, in practice, attempts to stall, evade answering questions and improperly limit the questioning are at least as common, and at least as great a problem, as attempts to prolong a deposition unnecessarily. The Litigation Section believes there is no basis for shifting

the burden of seeking judicial relief from the deponent to the party taking the deposition. The current Rules provide ample means for the deponent to seek judicial protection if the deposition process is truly being abused in a particular case.

FEDERAL RULES OF EVIDENCE

Rule 703. Bases of Opinion Testimony by Experts.

The proposed amendment would presumptively prohibit disclosure to a jury of inadmissible information that forms the basis of an expert's opinion. The proposed amendment would require the proponent of the expert testimony to secure from the court, by motion in limine or otherwise, a ruling that the probative value of the otherwise inadmissible evidence substantially outweighs its prejudicial effect. The Litigation Section believes that proposed change could encourage parties to withhold objections to expert testimony until trial, and then attempt to preclude the expert from providing any explanation of the basis for his opinion, based on evidentiary objections that neither the opposing counsel nor the Court have had time to consider thoroughly. The basis for a testifying expert's opinion can be thoroughly probed in discovery, and it should not be a surprise to the opposing party. Under the existing rules, if the basis for the expert's opinion would be inadmissible, the opposing party may seek a ruling in advance of trial limiting or excluding the expert's testimony. This case-by-case approach, with an opportunity for briefing and thorough consideration, seems preferable to a rule that would have the practical effect of encouraging surprise objections to what may be the most critical part of a litigant's case. The Section does not believe a change in the current practice is necessary.