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The District of Columbia Bar

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MEMORANDUM

TO: Members of the Board of Governors

FROM: Lynne M. Lester *LM*
Manager, Divisions Office

DATE: January 30, 1986

SUBJECT: Report recommending an amendment to Rule 39-I of the D.C. Superior Court Rules of Civil Procedure so as to permit the Civil Calendar Control Judge to enter a default or dismiss the action for failure of one party in a Civil II case to appear in the Civil Assignment Office at the date and time scheduled for trial.

Pursuant to the Division Guidelines No. 13, Sections a and c, the enclosed public statement is being sent to you by Court Rules Committee, Division 4-Courts, Lawyers and the Administration of Justice.

a(iii): "No later than 12:00 noon on the seventh (7th) day before the statement is to be submitted to the legislative or governmental body, the Division will forward (by mail or otherwise) a one-page summary of the comments (summary forms may be obtained through the Divisions Office), the full text of the comments, and the full text of the legislative or governmental proposal to the Manager for Divisions. The one-page summary will be sent to the Chairperson(s) of each Division steering committee and any other D.C. Bar committee that appear to have an interest in the subject matter of the comments. A copy of the full text and the one-page summary will be forwarded to the Executive Director of the Bar, the President and President-Elect of the Bar, the Division's Board of Governors liaison, and the chairperson of the Committee on Divisions. Copies of the full text will be provided upon request through the Divisions Office. Reproduction and postage expenses will be incurred by whomever requested the full text (i.e., Division, Bar committee or Board of Governors

BOARD OF GOVERNORS

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account). The Manager for Divisions shall help with the distribution, if requested, and shall forward a copy of the one-page summary to each member of the Board of Governors. In addition, the Manager for Divisions shall draw up a list of all persons receiving the comment or statement, and he/she shall ascertain that appropriate distribution has been made and will assist in collecting the views of the distributees. If no request is made to the Manager for Divisions within the seven-day period by at least three (3) members of the Board of Governors, or by majority vote of any steering committee or committee of the Bar, that the proposed amendment be placed on the agenda of the Board of Governors, the Division may submit its comments to the appropriate federal or state legislative or governmental body at the end of the seven-day period.

c(ii): "The Board of Governors may request, pursuant to sub-section (a)(iv), that the Division comments on proposed court rules change be placed on the Board agenda only if (a) the proposed court rule is so closely and directly related to the administration of justice that a special meeting of the Bar's membership pursuant to Rule VI, Section 2, or a special referendum pursuant to Rule VI, Section 1, should be called or (b) the proposed rule affects the practice of law--generally, the admission of attorneys, their discipline, or the nature of the profession."

a(v): "Another Division or committee of the Bar may request that the proposed set of comments by a Division be placed on the Board's agenda only if such Division or committee believes that it has greater or coextensive expertise in or jurisdiction over the subject matter, and only if (a) a short explanation of the basis for this belief and (b) an outline filed with both the Manager for Divisions and the commenting Division's chairperson. The short explanation and outline or proposed alternate comments will be forwarded by the Manager for Divisions to the Board members."

a(vi): Notice of the request that the statement be placed on the Board's agenda lodged with the Manager for Divisions by any Board member may initially be telephoned to the Manager for Divisions (who will then inform the commenting Division), but must be supplemented by a written objection lodged within seven days of the oral objection."

c(iii): "If the comments of the Division on a proposed court rules change is placed on the agenda of the Board of Governors, the Board may adopt the comments as the Board's own views, in which case no mandatory disclaimer (see Guideline No. 14) need be placed on the comments. If the Board and the Division differ on the proposal, each may submit its own views."

Please call me by 5:00 p.m., Wednesday, February 5, 1986
if you wish to have this matter placed on the Board of Governors'
agenda for Tuesday, March 11, 1986.



The District of Columbia Bar

PROPOSED PUBLIC STATEMENT SUMMARY

Date: 1/21/86

Division: 4

Committee: Court Rules

Contact Person: Kandy Norton

Type of public statement: Amicus Brief _____ Resolution _____
Letter _____ Testimony _____
Report/study x _____ Other _____

Comments approved by the steering committee: Yes x No _____

Recipient of public statement: Superior Court

Expedited consideration requested (two-day review period): Yes _____ No x

Standard seven-day review period requested: Yes x No _____

Subject title: Report Recommending an Amendment to Rule 39-I of the
Superior Court Rules & Civil Procedure

Summary (please type-if more space is needed please attach a separate page)

Attached

SUMMARY OF PROPOSAL TO AMEND
SUPERIOR COURT RULE 39-I

Division IV, Committee on Court Rules, recommends an amendment to Rule 39-I of the Rules of Civil Procedure for the Superior Court of the District of Columbia in order to permit the Civil Calendar Control Judge to enter a default or dismiss the action for failure of one party in a Civil II case to appear in the Civil Assignment Office at the date and time scheduled for trial. The practice of the Assignment Office had been to permit the party actually appearing for trial to take the file to the Civil Calendar Control Judge to move for dismissal or a default. However, a recent District of Columbia Court of Appeals decision ruled that the language of Rule 39-I required that a dismissal could be entered only by a trial judge when the case had actually been assigned for trial. The suggested amendment is an effort to incorporate the old practice which was more efficient from the standpoints of both judicial efficiency and the convenience and economy of the parties.

REPORT OF THE COMMITTEE ON COURT RULES
OF DIVISION IV OF THE DISTRICT OF COLUMBIA BAR
RECOMMENDING AN AMENDMENT TO RULE 39-I OF THE
RULES OF CIVIL PROCEDURE FOR THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

David J. Hayes, Co-Chair
Ellen Bass, Co-Chair
Claudia Ribet
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Gerald P. Greiman
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Joel P. Bennett
Richard B. Nettler
Con Hitchcock
Richard Hoffman
Gerald P. Greiman
Randall J. Bramer

Steering Committee
Division IV

Members of the Committee
on Court Rules who
participated in this report

STANDARD DISCLAIMER

"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."

DIVISION IV RULES COMMITTEE PROPOSAL
TO REVISE RULE 39-I OF THE RULES
OF CIVIL PROCEDURE OF THE SUPERIOR
COURT OF THE DISTRICT OF COLUMBIA

Rule 39-I deals with the appearance of a party for trial and the sanctions if a party fails to appear. Although the precise language of that rule states that its provisions apply "when an action is called for trial," it had been given a less literal and more practical application in cases on the Civil II calendar. A recent decision of the District of Columbia Court of Appeals has disapproved of that practical application, leading to this proposal for amendment of the rule.

In Civil II cases, a suit is not assigned to a single judge but, rather, is given a trial date and time at which the parties are instructed to appear at the Civil Assignment Office. When the parties appear on the trial date, the cases are assigned to a judge, as judges become available, based on a system of priority. Rule 40-I(a) through (d). Often the parties will have to wait the better part of a day before being assigned to a judge and, on occasion, a case will not be reached at all. In such instances, the Civil Assignment Commissioner will set a new trial date, generally at least two or three months in the future.

It had been the practice in the Civil Assignment Office not to assign a case to a judge until all the parties were present and ready to proceed. If a judge became available and the next case on the list did not have all parties present, it would be "bumped" and the case next in line behind it would be sent to the judge. On days in which only a limited number of judges were available, such "bumping" could mean that the case would not be reached at all that day. However, it was also the practice that the party which was ready for trial could take the file into the Civil Calendar Control Courtroom (Courtroom 9) and request that the case be dismissed or a default entered, pursuant to Rule 39-I, because the opposing party was not present or was not prepared to go forward.

However, on April 22, 1985, the District of Columbia Court of Appeals entered a decision giving Rule 39-I its literal reading, and ruling that, inter alia, a dismissal could not be entered under that rule by the Calendar Control Judge because the case had not been "called for trial." LaPrade v. Lehman, 490 A.2d 1151 (D.C. 1985). In that case, defendant had been present in the Civil Assignment Office all morning, while plaintiff did not appear until well after he was scheduled to appear.

Judge Nebeker dissented from the majority's literal reading of the rule and stated:

"This decision ought to alarm everyone concerned with litigation

delay and concomitant costs. In remanding this case to the trial court for the second time, we are both wresting power from the calendar control court and failing in our obligation to improve the efficiency of judicial administration. When reviewing a case such as this one, this court should consider not only the interests of the respective parties but also those of witnesses and other litigants awaiting their day in court."

490 A.2d at 1156.

It is the Committee's belief that the concerns expressed in Judge Nebeker's dissent should be addressed by an amendment to the rule. Given the nature of the Civil II assignment system, permitting a party to fail to appear on the scheduled date and time and thereby obtaining a delay or a de facto continuance because of the "bumping" procedure is completely contrary to the interests of judicial efficiency. ^{*}/ Furthermore, waiting to be assigned a judge is not pleasant, but it is a burden which is imposed on all Civil II litigants by the present assignment system. It is

* The Committee has inquired of the Civil Assignment Office, and been advised by an employee there, that under the post-LaPrade practice, a case in which the party fails to appear is still not given a priority "number" indicating its place in the "line" of cases to be assigned to trial judges. Rather, if the party who appears requests it, the assignment office will attempt to locate a trial judge to hear the party's motion under Rule 39-I. Often, such a trial judge cannot be located and the party appearing for trial will have no recourse over the party not appearing. In such a situation, the case will merely be rescheduled for the next available trial date.

not fair or efficient that this burden should be solely shouldered by one of the parties only to have the other party rush to the courthouse once the case has been assigned to a judge. The most efficient method of dealing with the failure to appear of one party is the practical one utilized by the court before the LaPrade decision.

Inasmuch as the Court of Appeals has construed Rule 39-I to eliminate this practical system, the only remedy would appear to be an amendment of the rule to incorporate that practice. The Committee would, therefore, suggest that Rule 39-I be amended to read as follows:

"(a) When no response by any party. When an action is called for trial, or when the parties to such action are scheduled to appear in the Civil Assignment Office for trial, and no party responds, the Court may dismiss the same, with or without prejudice, or take such other action as may be deemed appropriate.

(b) When no response by party seeking relief. When an action is called for trial or when the parties to such action are scheduled to appear in the Civil Assignment Office for trial, and the party seeking affirmative relief fails to respond at the time such party was scheduled to appear, an adversary may have the claim dismissed, with or without prejudice as the Court may decide, or the Court may, in a proper case, conduct a trial or other proceeding.

(c) When no response by party against whom relief is sought. When an action is called for trial or when the parties to such action are scheduled to appear in the Civil Assignment Office for trial, and a party against whom affirmative relief is sought fails to respond at the time such party was scheduled to appear,

in person or through counsel, an adversary may where appropriate proceed directly to trial. When an adversary is entitled to a finding in his favor on the merits, without trial, he may proceed directly to proof of damages. (Added, Feb. 6, 1974.)

(New provisions indicated by emphasis.)