SECTIONS
DISTRICT OF COLUMBIA BAR

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

FROM: Carol Ann Cunningham

DATE: August 28, 1992

SUBJECT: PUBLIC STATEMENT regarding Proposed Letter to
the Judicial Conference of the United States on
the Proposed Disclosure Amendment to Rule 26(a)
of the Federal Rules of Civil Procedure by the
Section on Courts, Lawyers and the
Administration of Justice

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 September 8, please call me at the Sections Office by 5:00 p.m. on Friday, September 4. I can be reached at (202) 331-4364.

Please note that according to the Guidelines regarding public statements (pp. 38-49) your telephone call "must be supplemented by a written objection lodged within seven days of the oral objection."

Enclosures

cc with full public statement:
Jamie S. Gorelick
Mark H. Tuohey III
Frederick D. Cooke Jr.
Celia A. Roady
Barbara J. Kraft
Katherine A. Mazzaferri
LETTER TO THE JUDICIAL
CONFERENCE OF THE UNITED STATES
ON THE PROPOSED DISCLOSURE
AMENDMENT TO RULE 26(a) OF
THE FEDERAL RULES OF
CIVIL PROCEDURE

Brian Busey, Cochair
Donna M. Murasky, Cochair
Carol Elder Bruce
Carol Fortine
Eric H. Holder, Jr.
David A. Reiser
Donna L. Wulkan

August 27, 1992

Steering Committee of the
Courts, Lawyers and the
Administration of Justice
Section

STANDARD DISCLAIMER AND DISCLOSURE

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.
Summary of Proposed Letter of
the Courts, Lawyers and
The Administration of Justice
Section to the Judicial
Conference of the United States

The Courts, Lawyers and the Administration of Justice Section and the Court Rules Committee, which regularly monitors and comments on proposed changes in federal and local court rules, intends to submit a letter to the Judicial Conference of the United States on the proposed disclosure amendment to Rule 26(a) of the Federal Rules of Civil Procedure.

The letter notes that the Section previously submitted comments to the Committee on Rules of Practice and Procedure of the Judicial Conference on the proposed amendments to the Federal Rules of Civil Procedure, including proposed amendments to Rule 26(a). In those comments, the Section specifically opposed the automatic disclosure feature of the proposed amendments to Rule 26(a).

Following considerable debate, the Advisory Committee on Civil Rules forwarded a revised version of the proposed amendment to Rule 26(a) to the Committee on Rules of Practice and Procedure. That committee has, in turn, forwarded the revised version of the changes to Rule 26(a) to the Judicial Conference for approval, although the revised version has not been reissued for public comment.

The Litigation Section of the District of Columbia Bar intends to submit a statement shortly to the Judicial Conference requesting that the proposed disclosure amendment to Rule 26(a) be returned to the Committee on Rules of Practice and Procedure for further public comment and, thereafter, reconsideration. The Section on Courts, Lawyers and the Administration of Justice joins this request and endorses the Litigation Section’s statement.

The Section believes that the new revised version of the disclosure amendment to Rule 26(a), while an improvement on the earlier proposed version, would result in a substantial change from current discovery practice. The revised version of the disclosure amendment simply does not address all of the significant concerns expressed in the Section’s comments on the earlier version of that proposal. In view of the fundamental and far-reaching changes that would be effected by the proposed amendment, the Section believes that republication and reconsideration are warranted.
The Chief Justice of the United States
William H. Rehnquist
Chairman, Judicial Conference of
the United States
811 Vermont Avenue, N.W.
Suite 713
Washington, DC 20544

Dear Mr. Chief Justice:

This letter is submitted on behalf of the Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar and that Section's Committee on Court Rules. 1/

In February 1992, this Section submitted comments to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States on the proposed amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Among those comments were comments on the proposed amendments to Rule 26(a) of the Federal Rules of Civil Procedure, as published for public comment by the Advisory

1/ 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.
Committee on Civil Rules in August 1991. The Section opposed the automatic disclosure feature of the proposed rule.

The Advisory Committee on Civil Rules has now forwarded a new proposed amendment to Rule 26(a) to the Committee on Rules of Practice and Procedure. We understand that that Committee has, in turn, forwarded the new proposal to the Judicial Conference for approval. The new proposed rule has not been reissued for public comment.

The Litigation Section of the District of Columbia Bar has adopted and is submitting a statement to the Judicial Conference of the United States requesting the Conference to return the proposed disclosure amendment to Rule 26(a) to the Committee on Rules of Practice and Procedure for reconsideration following an opportunity for public comment. The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar joins the request of the Litigation Section and endorses its statement in support of republication and reconsideration.

In addition, the Section on Courts, Lawyers and the Administration of Justice believes that the new version of the automatic disclosure proposal itself would effect a substantial change from current discovery practice and continues to raise significant issues worthy of public comment. Although the Section believes that the revision does represent an improvement over the original proposal, it does not, in our view, adequately address all of the concerns identified in our prior comments and in the comments of other members of the legal community.
We look forward to an opportunity to provide detailed comments on the proposed amendments to Rule 26(a) to the Committee on Rules of Practice and Procedure in the event that the new proposal is republished for public comment.

Respectfully submitted,

Brian Busey
Donna M. Murasky
Cochairs, Section on Courts, Lawyers and the Administration of Justice

Thomas C. Papson
Richard B. Nettler
Cochairs, Committee on Court Rules

cc: The Honorable Robert E. Keeton (Boston Chambers)
Professor Thomas E. Baker
The Honorable William O. Bertelsman
The Honorable Frank H. Easterbrook
The Honorable T.S. Ellis, III
Alan W. Perry, Esquire
The Honorable Edwin J. Peterson
The Honorable George C. Pratt
The Honorable Dolores K. Sloviter
The Honorable Alicemarie H. Stotler
The Honorable George J. Terwilliger, III
William R. Wilson, Esquire
Professor Charles Alan Wright
Dean Daniel Coquillette
Joseph P. Spaniol, Jr., Esquire
can provide the parties with a better opportunity to determine priorities and exercise selectivity in presenting evidence than when limits are imposed during trial. Any such limits must be reasonable under the circumstances, and ordinarily the court should impose them only after receiving appropriate submissions from the parties outlining the nature of the testimony expected to be presented through various witnesses, and the expected duration of direct and cross-examination.


(a) Required Disclosures; Discovery Methods to Discover Additional Matter.

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in
the possession, custody, or control of
the party that are relevant to disputed
facts alleged with particularity in the
pleadings:

(C) a computation of any category
of damages claimed by the disclosing
party, making available for inspection
and copying as under Rule 34 the
documents or other evidentiary material,
not privileged or protected from
disclosure, on which such computation is
based, including materials bearing on the
nature and extent of injuries suffered;
and

(D) for inspection and copying as
under Rule 34 any insurance agreement
under which any person carrying on an
insurance business may be liable to
satisfy part or all of a judgment which
may be entered in the action or to
indemnify or reimburse for payments made
to satisfy the judgment.

Unless otherwise stipulated or directed by the
court, these disclosures shall be made at or
within 10 days after the meeting of the
RULES OF CIVIL PROCEDURE

43 parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

52 (2) Disclosure of Expert Testimony.

53 (A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

59 (B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the
witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on
the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification...
of each document or other exhibit,
including summaries of other evidence,
separately identifying those which the
party expects to offer and those which
the party may offer if the need arises.

Unless otherwise directed by the court, these
disclosures shall be made at least 30 days
before trial. Within 14 days thereafter,
unless a different time is specified by the
court, a party may serve and file a list
disclosing (i) any objections to the use under
Rule 32(a) of a deposition designated by
another party under subparagraph (B) and (ii)
any objection, together with the grounds
therefore, that may be made to the
admissibility of materials identified under
subparagraph (C). Objections not so
disclosed, other than objections under Rules
402 and 403 of the Federal Rules of Evidence,
shall be deemed waived unless excused by the
court for good cause shown.

(4) Form of Disclosures: Filing. Unless
otherwise directed by order or local rule, all
disclosures under paragraphs (1) through (3)
shall be made in writing, signed, served, and
promptly filed with the court.

(5) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the