SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE AND THE LITIGATION SECTION OF THE DISTRICT OF COLUMBIA BAR

COMMENTS OF THE SECTION ON COURTS, LAWYERS, AND THE ADMINISTRATION OF JUSTICE AND THE LITIGATION SECTION OF THE DISTRICT OF COLUMBIA BAR ON PROPOSED AMENDMENTS TO THE SUPERIOR COURT RULES

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The Superior Court Rules Committee and the Superior Court Advisory Committee on the Rules of Criminal Procedure have requested comment on various amendments to the Superior Court Civil and Criminal Rules in light of amendments to the Federal Rules of Civil and Criminal Procedure. The District of Columbia Bar's Section on Courts, Lawyers, and the Administration of Justice and its Committee on Court Rules, and the Bar's Litigation Section and its Committee on Court Rules and Legislation, submit these comments concerning certain of these proposals.

The District of Columbia 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. This Section has a standing Committee on Court Rules, whose responsibilities include serving as a clearinghouse for comments on proposed changes to court rules. The Litigation Section, the largest Section of the D.C. Bar, represents over 2,700 members actively involved in litigating cases in the Superior Court and elsewhere, and they have a strong interest in the Court's Rules. Comments submitted by the Sections represent only their views, and not those of the D.C. Bar or of its Board of Governors.

We generally agree with the proposals to adopt the Federal Rules with modifications to conform to Superior Court practices that serve the particular needs of the District of

Columbia and that have proven to work well. The Superior Court should follow the Federal Rules unless there is a good reason not to do so. The proposed amendments are consistent with this principle.

In particular, we commend the decision of the Superior Court Rules Committee not to adopt certain amendments of the Federal Rules of Civil Procedure concerning discovery. The most significant of the federal 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 and generate litigation over the interpretation and application of the new procedures. Mandatory disclosure would add an unnecessary round to the discovery process in cases in which the parties would otherwise conduct little or no formal discovery. Uncertainty about the meaning of the rule would increase the likelihood of satellite litigation, especially in light of the severe sanctions that can be imposed under the federal rule for disclosures that are judged incomplete in hindsight. Mandatory disclosure also has the potential to undermine important values protected by the adversary process, including the attorney-client privilege and the work-product doctrine.

We are not aware of any evidence that the benefits of the mandatory disclosure rule have outweighed its costs in those federal courts that adopted automatic disclosure in the

past year. In fact, widespread criticism of this approach persuaded a majority of federal district courts to opt out of Rule 26(a)(1). Whatever the justification for this procedure in a minority of federal courts, there does not appear to be any problem in the Superior Court that this approach would even arguably solve. The Superior Court has implemented a successful civil case management program that has substantially increased in the number of civil dispositions and substantially reduced its civil caseload in the last few years. District of Columbia Courts, 1993 Annual Report at 52, 74. At a minimum, it would be premature to consider adoption of the federal rule for the Superior Court unless and until experience in those federal courts that have implemented it demonstrates that it reduces, rather than creates, problems in the discovery process.