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SECTIONS
DISTRICT OF COLUMBIA BAR

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

FROM: Carol Ann Cunningham CAC

DATE: August 21, 1992

SUBJECT: PUBLIC STATEMENT regarding Proposed Statement 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 Litigation

Enclosed please find for your immediate review a one-page summary of a public statement prepared by the Litigation 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, August 28. 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
Michael J. Madigan
Celia A. Roady
Barbara J. Kraft
Katherine A. Mazzaferri

Summary of Proposed Statement of the Litigation Section to the Judicial Conference

The Litigation Section intends to make a Statement to the Judicial Conference of the United States regarding the proposed disclosure amendment to Rule 26(a) of the Federal Rules of Civil Procedure.

The Statement requests that the Judicial Conference return the proposed disclosure amendment to the Standing Committee on Rules of Practice and Procedure for a brief period of republication and reconsideration.

The Statement also joins in the Comments previously submitted by the Section on Courts, Lawyers and the Administration of Justice which opposed an earlier version of the proposed disclosure amendment on grounds that it would delay and complicate the discovery process.

As described in the Statement, the response of the Bench and the Bar to the initial draft of the proposed disclosure amendment was so overwhelmingly negative that the Standing Committee's Advisory Committee on Civil Rules decided to withdraw it. Later, however, the Advisory Committee reversed course, substantially redrafted the proposed amendment and forwarded it to the Standing Committee, which in turn forwarded it to the Judicial Conference. No meaningful opportunity has ever been provided for the legal community or the general public to comment on the disclosure amendment in its present form.

The Statement urges that the proposed disclosure amendment be returned for republication and reconsideration for three reasons.

First, premature action on a highly contested rule, such as the proposed disclosure amendment, will undermine the integrity and independence of the court rules amendment process. To work effectively, the process depends heavily on public involvement and support, both of which are lacking for the new disclosure requirement.

Second, successful implementation of any major change in the civil justice system, such as the proposed disclosure amendment, depends on the understanding, acceptance and cooperation of the legal community. At present, many in the legal community are strongly and deeply opposed to the proposed disclosure requirement, making successful implementation of any such requirement highly unlikely.

Third, a number of district courts are experimenting with automatic disclosure plans as part of the Civil Justice Reform Act. Empirical data from these experiences should be evaluated before any decision is made to go forward with a nationwide disclosure requirement.

Comments regarding the proposed disclosure amendment must be submitted to the Secretary of the Judicial Conference no later than September 11.

LITIGATION SECTION OF THE DISTRICT OF COLUMBIA BAR

STATEMENT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES ON PROPOSED DISCLOSURE AMENDMENT TO RULE 26(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

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Steering Committee of the
Litigation Section of the
District of Columbia Bar

August __, 1992

STANDARD DISCLAIMER AND DISCLOSURE

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 of its Board of Governors. The person principally responsible for preparing this Statement is Daniel F. Attridge.

STATEMENT OF THE LITIGATION SECTION OF THE DISTRICT OF COLUMBIA BAR TO THE JUDICIAL CONFERENCE OF THE UNITED STATES

The Litigation Section of the District of Columbia Bar respectfully submits this Statement to the Judicial Conference of the United States regarding the proposed disclosure amendment to Rule 26(a) of the Federal Rules of Civil Procedure.

Interest of the Litigation Section

The District of Columbia Bar currently has over 53,000 members. The Bar is organized into 21 specialized Sections, each of which focuses on a specific area of legal practice. One purpose of the Sections is to monitor developments in the law and to comment on timely issues within Section expertise and jurisdiction.

With over 2,600 members, the Litigation Section is by far the largest Section of the District of Columbia Bar. Its members are actively involved in litigating civil cases in the federal district courts throughout the Nation and have a strong interest in the substance of the rules and in protecting the integrity of the rulemaking process.

Requested Action

The Litigation Section requests that the Judicial Conference return the proposed disclosure amendment to Rule 26(a) to the Standing Committee on Rules of Practice and Procedure for a brief period of republication and reconsideration.

Concurrence in Comments of the Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar

In February 1992, the Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar submitted Comments on an earlier version of the proposed amendment to Rule 26(a) to the Standing Committee on Rules and Practice and Procedure.[1] The Courts, Lawyers Section opposed the proposed automatic disclosure requirement on grounds that it would delay and complicate the discovery process. The Litigation Section hereby joins in the Comments of the Courts, Lawyers Section in opposition to the proposed disclosure amendment.

Origin of the Proposed Disclosure Amendment

In August 1991, the Advisory Committee on Civil Rules published for public comment proposed amendments to the Federal Rules of Civil Procedure. Among the proposed amendments was a provision changing Rule 26(a) to require the automatic, pre-discovery

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[1] *See* Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar, Comments on Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence at 2, 5-7 (Feb. 14, 1992).

disclosure of certain information from all parties.

The response by the Bench and Bar to the proposed disclosure amendment was overwhelmingly negative. Among the specific concerns expressed were:

- Litigants often will not have sufficient information from the initial pleadings to make the required disclosure because of the vague complaints and answers permitted by notice pleading.

- Mandatory disclosure is inconsistent with the adversary system and the attorney-client relationship because it requires counsel to voluntarily disclose to an opponent information contrary to the client's interests and positions.

- The standard for making disclosure will foment discovery disputes and satellite litigation, particularly in complex or highly contentious cases because it has no clear, objective meaning based on existing law.

Due to the negative response, the Advisory Committee decided to table the proposed disclosure amendment at its February 1992 meeting. Rather than implement mandatory disclosure on a national level, the Advisory Committee decided to give each of the 94 districts the option of adopting its own form of disclosure as part of the Civil Justice Reform Act of 1990.

However, in April 1992, the Advisory Committee reversed its position and decided to go forward with a new proposed disclosure amendment. Substantial revisions were made at the meeting to the rule text in response to some of the strongest criticisms. The new proposal was then forwarded to the Standing Committee on Rules of Practice and Procedure, which in turn forwarded it to the Judicial Conference for its approval. The proposal in its present form has never been circulated to the legal community to determine whether the revisions made would actually solve the problems identified, and no opportunity for public comment on the current proposal has ever been allowed.

Why Republication and Reconsideration Are Needed

There are three principal reasons why the proposed disclosure amendment should be returned to the Standing Committee for republication and reconsideration.

First, premature action on a highly contested rule, such as the proposed disclosure amendment, will undermine the integrity and independence of the court rules amendment process. To work effectively, the process depends heavily on public involvement and support, both of which are lacking for the new disclosure requirement. Inadequate public participation in the rules amendment process may pose serious problems for both the Supreme Court and Congress. If the Judicial Conference were to forward the proposed disclosure requirement to the Supreme Court as is, the Court would be placed in the untenable position of having to act on a

controversial proposal that the public had no opportunity to comment on in its present form. And if the new proposal were further forwarded to Congress for its review, Congress would likely be pressured to closely scrutinize the proposal, which may cause the process to become overly policitized. Neither circumstance is consistent with the courts' need for rules that are firmly rooted in public participation.

Second, successful implementation of any major change in the civil justice system, such as the proposed disclosure requirement, depends on the understanding, acceptance and cooperation of the legal community. At present, many in the legal community are strongly and deeply opposed to the proposed automatic, pre-discovery disclosure. Republication and reconsideration will enable the Standing Committee to identify potential problems with its new disclosure amendment, to determine whether to abandon the proposal or to make appropriate revisions, and to build the consensus needed to gain acceptance for any new requirement. Without an opportunity for republication and reconsideration, successful implementation of any disclosure requirement is highly unlikely.

Third, a number of district courts are experimenting with automatic disclosure plans as part of the Civil Justice Reform Act. Experience from these district court plans could better inform the decision about what types of disclosure, if any, would be most appropriate for implementation on a national level. Returning the proposed amendment for republication and reconsideration will provide the needed opportunity for the Standing Committee to assess the existing empirical data from the district courts' experience and to ensure that any nationwide disclosure requirement is consistent with the lessons learned from that experience.

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.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(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

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.

(2) Disclosure of Expert Testimony.

(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.

(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 therefor, 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