GOVERNMENT CONTRACTS AND LITIGATION SECTION

The District of Columbia Bar

SUMMARY OF COMMENTS BY THE GOVERNMENT CONTRACTS AND LITIGATION SECTION ON PROPOSED CHANGES TO THE RULES OF THE U.S. CLAIMS COURT

The Government Contracts and Litigation Section of the District of Columbia Bar is submitting these comments in response to a Notice for Public Comment published by the United States Claims Court.

The Section's Comments are directed to all aspects of the proposed rules changes which, for the most part, relate to forms of pleadings, the logistics of filing pleadings and other "housekeeping" type provisions.

Although the Section is in favor of the majority of the proposed changes, the Section does request clarification with respect to a number of minor items, e.g. whether a certificate of service should follow the signature block on a pleading or follow the entire document, including appendix.

In addition to such requests for clarification, there are several points to which particular attention and comment was given. For example, the Section opposes that part of the proposed Rule that would prohibit parties and the Court from using unpublished decisions as precedent. The Section also opposes that part of the proposed Rule that makes the filing of a post-trial brief a matter of judicial discretion rather than a matter of right.

1707 L Street, NW, Sixth Floor, Washington DC 20036-4202 202/331-4364 Sections Infoline 202/223-7729 FAX 202/828-8572

BEFORE THE
UNITED STATES CLAIMS COURT

COMMENTS OF THE GOVERNMENT CONTRACTS AND LITIGATION SECTION OF THE DISTRICT OF COLUMBIA BAR ON PROPOSED CHANGES TO THE RULES OF THE U.S. CLAIMS COURT

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October 5, 1990

STANDARD DISCLAIMER

"The views expressed herein represent only those of the Section on Government Contracts and Litigation of the District of Columbia Bar and not those of the District of Columbia Bar or of its Board of Governors."

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GOVERNMENT CONTRACTS AND LITIGATION SECTION

October 5, 1990

Chief Judge Loren A. Smith
United States Claims Court
717 Madison Place, N.W.
Washington, D.C. 20005

Re: Comments On The Proposed Changes To The Rules Of The United States Claims Court

Dear Chief Judge Smith:

The Government Contracts and Litigation Section of the District of Columbia Bar submits the following comments on the proposed changes to the Rules of the United States Claims Court. Thank you for the opportunity to submit our comments on the proposed rules.

Please note that the views expressed herein represent only those of the Government Contracts and Litigation Section of the District of Columbia Bar and not those of the District of Columbia Bar or its Board of Governors.

COMMENTS

As members of the Government Contracts and Litigation Section of the District of Columbia Bar, we represent clients from both the Government and the private sector before the Claims Court. In general, we believe that the proposed Rules of the United States Claims Court ("Court") are cogent and well articulated. Indeed, we are delighted that the Court has eliminated Appendix G's mandatory "Joint Memorandum Re: Stipulations" and made the entry of stipulations more discretionary. And, we are happy to see that the Court's subpoena provisions now conform to those of the Federal Rules of Civil Procedure. However, in a number of instances, we believe the Rules should be simplified to better suit the essential functions to be accomplished by the Court. Our comments to the proposed Rules are set out below:

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Rule 3. Commencement of Action.

This Rule requires the Plaintiff to file an original and seven copies of the complaint and a new form, a completed cover sheet. The newly added cover sheet appears to be a good vehicle for the Court to determine the nature and complexity of the case being filed and thereby aid in the efficient distribution of the Court's judicial resources. In addition, it will permit the Court to obtain information for the statistics required by Congress. However, in adding this new requirement, we request that the Court make it clear that any failure to provide a completed cover sheet with the complaint is not jurisdictional and will not result in the Court's rejection of that pleading.[1/]

There is an additional point that could be clarified regarding this Rule. The Court maintains a night depository box, until midnight, for the filing of pleadings. Since the dates for filing complaints and notices of appeal are jurisdictional, we request that the Court clarify whether a pleading, such as a complaint or notice of appeal, that is filed in the night depository box on or before midnight be considered filed on that day of deposit or the next calendar day.

Rule 5. Service and Filing of Other Papers.

(c) Filing. We request clarification on what "other related discovery materials" is intended to mean. If the new category is meant to include documents such as protective agreements, we believe that the Court should

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1/ Plaintiffs have jurisdictional time limits for filing at the Court. Because the Court receives cases from cities throughout the United States, and occasionally from other countries, it is conceivable that a complaint could be mailed without a completed cover sheet and be received on the last day for filing that complaint. If the Court were to reject that complaint merely because it lacked the completed cover sheet, the litigant could be deprived of his or her choice of forum. At a minimum, the litigant could be forced to defend against a dispositive motion to dismiss the complaint on timeliness grounds merely because the Court rejected a pleading that contained a non-substantive deficiency that could have been quickly and easily corrected. In general, we believe that deficiencies of form should not be used to deprive a litigant of his or her day in court.

revise the Rule to permit the parties the opportunity to request that such documents be filed with the Court. Protective agreements are intended to protect sensitive information from unconsented to disclosure. We believe that a requirement to file such an agreement with the Court would be the best method to ensure that the parties uphold that agreement or receive appropriate penalties for a breach of that agreement.

(e) Proof of Service.

(C)(2) The proposed Rule is potentially ambiguous. We request clarification as to whether the certificate of service should be filed at the end of the pleading after the signature block, or at the end of the entire document, if the pleading contains an appendix including exhibits relevant to the pleading being filed. We believe the certificate should be filed at the end of the pleading after the signature block.

(3) No comment.

Rule 6. Time.

(b) Enlargement. ... (2) No comment.

(c) Additional Time After Service. We believe the proposed change can be further clarified to eliminate confusion on the time for acting following the service of any type of paper. Specifically, we propose that the additional three calendar days apply to the situation in which service of the paper, whether a court order, pleading, or other paper, is made other than by hand on the same day, unless the paper is a court order providing for a response by a specific date. In addition, we propose that the Rule clearly provide that if, by the addition of these three calendar days, the day for responding falls on a Saturday, Sunday, or holiday, Rule 6(a) of the Claims Court will govern the calculation of that due date. Accordingly, we propose that subparagraph (c) be changed to read:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a paper, and the service is made other than by hand on the same day, 3 calendar days shall be added to the prescribed period, except that no days shall be added when a

> specific date [~~or time limitation~~] is set by a court order.

Rule 6(a) governs the computation of that time period.

Rule 7. Pleadings Allowed; Form of Motions. No comment.

Rule 10. Form of Pleadings.

(a) Caption; Name of Parties. No comment.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions.

We agree that the Court should permit a member of the firm or agency to sign for the attorney of record. However, we believe that the proposed Rule is ambiguous in its direction as to how that attorney should sign. We propose that the Rule require the attorney signing for the attorney of record to sign his or her name. This change would serve two purposes. First, this would identify the actual signer of the document. Second, if the Court or opposing counsel had a question about the document being filed and required an immediate answer, the identification of the actual signer would provide the Court and opposing counsel with an immediate point of contact if the attorney of record is unavailable. Accordingly, we advocate changing the Rule to provide:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by or for the attorney of record. The name, street address and telephone number of the individual attorney of record shall be stated. In addition, if the pleading, motion or other paper is being signed for the attorney of record, the attorney signing therefor shall sign "(his or her name) for (the name of the attorney of record)."

Rule 12. Defenses and Objections - When and How Presented - By Pleading or Motion - Motion for Judgment on the Pleadings.

(a) When Presented. We are concerned that the proposed Rule is subject to potential abuse. For example, a party that has in excess of 10 days to respond to a pleading could be forced to respond to that pleading within only ten days if the opposing party files and then

withdraws a motion. To ensure that this abuse does not arise, we propose the following change to the proposed Rule:

> (a) ... The service of a motion permitted under this Rule or Rule 56 alters these periods of time, as follows, unless a different time is fixed by order of the court: (1) if the court denies or partially denies or partially allows the motion or postpones its disposition until the trial on the merits or the motion is withdrawn, the responsive pleading shall be filed within ten days after notice of the court's action, or the date on which the motion is withdrawn, or by the date the response otherwise would have been due, whichever is later; ...[Rule continues; no further changes.]

Rule 14. Third-Party Practice.

(a) When Third Parties May Be Brought In. No comment.

(c) Issuance and Service of Notice. We recognize that, in response to the recent Supreme Court decision in Martin v. Wilks, 109 S.Ct. 2180 (1989), the Court has deleted the language requiring the imposition of a bar where a third party fails to appear and assert his or her claim or interest. However, we believe that parties who choose not to appear may be adversely affected, even if their future claims are not automatically barred, and should be so advised. Accordingly, we propose including the following statement in the Rule or in the Comment to the Rule, if it is published with the Rule:

> However, potential third parties should be advised that if they fail to appear their interest may be adversely affected.

Rule 19. Joinder of Persons Needed for Just Adjudication. No comment.

Rule 20. Permissive Joinder of Parties. No comment.

Rule 21. Misjoinder and Non-joinder of Parties. No comment.

Rule 45. Subpoena. We are pleased that the Claims Court proposes to change the Rule to conform to the Federal Rules of Civil Procedure.

Rule 52.1. Unpublished Opinions.

We oppose that part of the proposed Rule that would prohibit parties and the Court from using unpublished opinions as precedent. We recognize the Court's fairness concern that unpublished opinions are sometimes difficult to locate and obtain, however we believe that the Court's concern can be allayed without the drastic remedy of precluding the parties and the Court from employing prior unpublished opinions.

We advocate the publication of all opinions issued by the Court because: (1) It is not always easy to determine the impact of an opinion. The ninety day period referencd in the proposed Rule may not be sufficient for the parties or any other person to ascertain whether the opinion has precedential value. In fact, it may take years until the precedential effect of a decision can be ascertained. (2) Consideration and/or publication of these opinions would provide counsel and the Court more exposure to the Court's opinions and views. (3) It is more fair that the parties and the Court be permitted to consider all cases decided by the Court as precedent in litigation at the Court or other courts.

To preclude any potential unfairness that citation to an unpublished opinion may have, we advocate that the Court publish all decisions or, if that is not feasible, that the Court change the Rule to require that (a) a party using an unpublished decision include a copy of that opinion in an Appendix to its pleading and (b) the Court grant a party an opportunity to respond to the arguments made by the opposing party using that unpublished opinion.

Rule 54. Judgment; Costs.

(d) Costs. We note a typographical error that appears both in the current and proposed Rule. We propose that the Court correct the Rule as follows:

> Except when express provision therefor is made either in a statute of the United States or in these Rules, costs shall be allowed as a matter of course ....

In addition, the comment to the proposed Rule should be revised to provide that "the language is added [~~deleted~~] ...."

Rule 56. Summary Judgment.

(d) **Procedures.** We would clarify the proposed change as follows:

> The following procedures shall be followed with respect to **any** motions for summary judgment **for an action** other than **an** [~~in~~] action ....

Rule 56.1 Review of Decision on the Basis of Administrative Record.

We think that the addition of this Rule may help clarify the review to be provided administrative decisions.

(a) **Standards.** No comment.

(b) **Procedures.** By requiring that the parties provide documents entitled "Statement of Facts" and "Counter-Statement of Facts," we would caution the Court not to make these requirements a basis for rejecting a pleading. As stated in our comments to Rule 3, supra, we do not believe that form should control over substance. Thus, if a pleading contains the requisite information, even though not properly captioned, we believe the Court should accept the pleading for filing and permit the litigant an opportunity to conform the submission to the Court's format requirements. For further comments on this Rule, the Court is referred to the Section's comments on proposed Appendix G, Rule 17.

Rule 59. New Trials; Rehearings; Amendment of Judgments; Reconsideration. No comment.

Rule 65. Injunctions.

(f) **Procedures.** (1) No comment.

(2) We note in passing that more and more individuals are using facsimile machines to correspond with clients and opposing counsel. We propose that the Court amend this Rule to also permit the use of a facsimile machine to notify the apparently successful bidder or his or her counsel of the intended application for an injunction.

Rule 72. Notice of Appeal. No comment.

Rule 77. Court and Clerk.

(f) Assignment of Cases.

(2) We propose that the Court insert a colon at the end of the proposed revision to make it clear that the revision is not missing any additional language.

In addition, we are aware of several instances in which the Clerk's Office has advised counsel that he or she is not required to file a "Notice of Related Case" where there are no pending or previous related cases. We request that the Court clarify whether, in fact, a Notice is required in that circumstance.

(k) Fee Schedule. No comment.

Rule 77.3. Withdrawal of Papers, and Exhibits, and In Camera Documents.

(d) Physical Exhibits. We propose that the Court revise this subheading to identify that it also covers in camera documents. In addition, because this paragraph concerns the disposal of in camera exhibits and these exhibits may contain protected material, we request clarification as to the Court's intended method of disposing of these documents, e.g., will these documents be shredded, returned to the parties, or archived somewhere.

Rule 77.4. Taxation of Costs. No comment.

Rule 79. Books and Records Kept by the Clerk and Entries Therein. No comment.

Rule 81. Attorneys.

(a) Attorneys Eligible to Practice. No comment.

(b) Admission to Practice.

(4) Fee for Admission. No comment.

(d) Attorneys of Record.

(2) Authorization To Sign Filings. We propose that the Court revise this Rule in the same manner as set forth in our comment on proposed Rule 11, supra.

(3) Appearance. No comment.

(e)(2) Responses and Reply. No comment.

Rule 82. Form, Size and Duplication of All Papers.

(c) Form and Size. We believe that the proposed Rule should be clarified. Specifically, it appears that the Court is concerned about the legibility of the printed matter being provided to the Court. While we agree that it is important that the printed matter be provided in the most legible form possible, there are times when the only original available is a telecopy or computer print out. Consistent with our concerns that format not control over substance, we propose that the Court accept this type of submission for purposes of ascertaining that the paper is timely filed, but notify counsel of the deficiency and require him or her to correct that deficiency within a stated time period by hand-delivery or mailing of the conforming copy.

Rule 83.1 Content of Briefs or Memoranda; Length of briefs or Memoranda. No comment.

APPENDIX G - PROCEDURES BEFORE TRIAL

I. GENERAL

1. No comment.

II. EARLY MEETING OF COUNSEL

2. No comment.

III. JOINT PRELIMINARY STATUS REPORT

3. a. No comment.

b. No comment.

c. No comment.

d. We propose that the newly added words "or any other court" be changed to "any other tribunal." This change would reflect the fact that other proceedings, such as a Board of Contract Appeals appeal, a General Accounting Office bid protest or investigation, or an arbitration could be prior pending proceedings that would justify the Court's deferral of proceedings at the Claims Court.

e. No comment.

f. No comment.

g. No comment.

h. No comment.

i. No comment.

j. We are in favor of making an expedited proceeding available to the parties without reference to the amount in dispute.

k. No comment.

4. No comment.

5. No comment.

6. Scheduling Orders.

a. In Standard Cases. No comment.

b. In Expedited Trial Cases. We are in favor of the proposed limits on discovery because the Court retains the authority to provide the parties additional discovery.

V. PRE-TRIAL CONFERENCE

9. Scheduling. No comment.

10. Meeting of Counsel.

a. No comment.

b. We request that the Court clarify its reasons for requesting that the parties exchange the telephone numbers of their witnesses. We have two areas of concern regarding this proposed requirement. First, witnesses may have unpublished telephone numbers and may be reluctant to provide these numbers. Second, if the intent of this Rule is to enable opposing counsel to contact the other party's witnesses, we would be opposed to this change. Problems with such contacts may arise because the witness is a past or present officer or employee of a company or agency and has or has had access to proprietary, confidential or classified information.

Under these circumstances, we think the better Rule would be for counsel to identify their respective witnesses, but require that an opposing counsel communicate with a witness through the counsel calling that witness. In fact, such contacts by opposing counsel may violate the Canons of Ethics for a particular State or jurisdiction.

11. Memorandum of Contentions of Fact and Law.

We favor this change. We agree that the former seven day Rule provided for submission of that document too close to the day of trial. However, because new facts and documents may come to light between the proposed forty-five day period and the time of trial, we recommend that the Court revise this Rule to preserve the parties right to supplement the memorandum.

12. Witness List.

a. We propose that this paragraph be revised to provide that the parties may call additional previously unidentified witnesses under a good cause exception to the proposed Rule. Specifically, we believe there may be circumstances, in addition to impeachment, in which such a witness is needed for fairness purposes. Thus, for example, an issue, that was not previously considered important, may become so important at trial that a fair resolution of the case requires that an additional previously unanticipated witness be called; under such a circumstance, without that witness, a fair resolution of the case would be impossible. Accordingly, we advocate the following revision of the proposed Rule:

> a. ... As to each witness, the party shall indicate the specific topics to be addressed in the expected testimony and the <u>estimated</u> time needed for direct examination. Absent agreement of the parties <u>or a finding of good cause</u> no witness ... .

14. Stipulations.

We believe the revision to be appropriate.

15. Issues of Fact and Law. No comment.

16. Responses. No comment.

17. **Post-Trial Briefing.**

We oppose this proposed Rule. We think that the parties should be provided the opportunity to submit post-trial briefs and proposed findings of fact if they choose. The post-trial brief is an opportunity for the parties to present their case in light of all that has been adduced at trial. The pre-trial brief, including proposed findings of fact and law, required by Rule 11 may not be complete and it is not an adequate substitute for a post-trial brief. Often, it is not until the trial is completed, witnesses have testified, and the documents have been accepted into evidence that a complete statement of proposed findings of fact and law can be prepared. We think that it would be more fair to provide the parties the opportunity to submit post-trial briefs, than to require pre-trial briefs and no opportunity for post-trial briefing. Accordingly, we recommend that the Court revise the Rule by allowing the parties and the trial judge to determine whether the parties should submit pre-trial or post-trial submissions or to consolidate the pre-trial submission and the post-trial brief into one post-trial submission.

CONCLUSION

We want to thank you for the opportunity to submit our comments on the proposed Rules. We would be happy to meet with you to discuss our comments and to work on solutions thereto.

Sincerely,

Insert Steering Committee Signatures

Susan Warshaw Ebner, Chair
David P. Hendel
Eva Plaza
Raymond Pushkar
John A. Whitney

COMMITTEE ON COURT AND BOARD PRACTICE,
DISTRICT OF COLUMBIA BAR,
GOVERNMENT CONTRACTS AND LITIGATION SECTION

cc: Josephine Ursini, Esquire
Greg A. Smith, Esquire