Steering Committee:
y C. Epstein, Co-Chair
A. Fortine, Co-Chair
Susan L. Bloch
Joy A. Chapper
Stephen H. Glickman
Arthur B. Spitzer
Donna L. Wulkan

Daniel F. Attridge
Chair, Council on Sections

John W. Behringer
Vice Chair, Council on Sections

Michael J. Madigan
Board of Governors Liaison

Andrew E. Jenkins III
Board of Governors Liaison

Carol Ann Cunningham
Sections Manager

Committee:
Court Rules and Legislation

The District of Columbia Bar

Robert N. Weiner
D.C. Bar President

Myles V. Lynk
D.C. Bar President-Elect

Katherine A. Mazzaferri
D.C. Bar Executive Director

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

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar, and its Committee on Court Rules and Legislation, submits comments to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States concerning a draft of amendments to the Federal Rules of Civil Procedure, Criminal Procedure, Appellate Procedure, Bankruptcy Procedure, and Evidence.

The Section generally supports proposed amendments to Federal Rule of Civil Procedure 26(c) providing that district courts may, but are not required to, enter stipulated protective orders without a finding of good cause, and that the courts have the power to modify or dissolve protective orders taking into account a broadly-defined list of factors. The Section agrees that courts should have the discretion to enter stipulated protective orders without a finding of good cause. We agree that the Civil Rules should provide guidance to judges faced with requests to modify protective orders, and recommend three additional factors be added to the list of considerations that district judges should consider: (a) whether any circumstances initially justifying the protective order have changed since its entry; (b) whether the order was entered by stipulation without a judicial determination of good cause, or based on a judicial finding of good cause after an opportunity for public comment; and (c) whether the case has been finally resolved. In addition, the rule should clarify that the party or nonparty seeking modification bears the burden of proof. The Section also suggests that before recommending adoption of the proposed changes to Rule 26, the Advisory Committee consider whether to complete its on-going analysis of agreements to return or destroy unfiled discovery materials.

The Section strongly supports the proposed amendments to Civil Rule 47(a) and Criminal Rule 24(a) to allow the parties, through their counsel, to participate in the examination of prospective jurors. We believe the proposed amendments represent a reasonable middle ground between the extremes of unrestricted attorney voir dire on the one hand, and a complete ban on attorney voir dire on the other. Attorney participation, within reasonable bounds established by the district court in its discretion, will help to promote the confidence of litigants and the public in our jury trial system.

Finally, the Section welcomes the proposal to restore the requirement of a twelve-member jury in federal civil cases.

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

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has solicited comments on a draft of amendments to the Federal Rules of Civil Procedure, Criminal Procedure, Appellate Procedure, Bankruptcy Procedure, and Evidence. The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar, and its Committee on Court Rules and Legislation, submit these comments on the proposals concerning protective orders, attorney voir dire, and twelve-person juries.

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. The Section has a standing Committee on Court Rules and Legislation, whose responsibilities include serving as a clearinghouse for comments on proposed changes to court rules.

Comments submitted by the Section represent only its views, and not those of the D.C. Bar or of its Board of Governors.

Civil Rule 26(c) - Entry and Modification of Protective Orders

The Advisory Committee on Civil Rules has proposed amendments to Rule 26(c) explicitly providing that district courts may, but are not required to, enter stipulated protective orders without a finding of good cause, and that the courts have the power to modify or dissolve protective orders taking into account a broadly-defined list of factors. As a possible related amendment to Rule 5, the

Advisory Committee is considering regulation of agreements among parties to concerning discovery materials not filed with the Court.

These proposals should be evaluated according to certain basic principles:[1/]

1. We endorse the presumption in the Federal Rules of Civil Procedure that discovery materials should normally be available to the public unless a sufficient showing has been made that access should be restricted. *See Public Citizen v. Liggett Group*, 858 F.2d 775, 789-90 (1st Cir. 1988) (citations omitted), *cert. denied*, 488 U.S. 1030 (1989). As the Advisory Committee has recognized, the requirement of filing unless the court specifically orders otherwise is important because discovery "materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally." Fed. R. Civ. P. 5(d), Advisory Committee Note, 85 F.R.D. 521, 525 (1980). "The Advisory Committee notes make clear that Rule 5(d), far from being a housekeeping rule, embodies the Committee's concern that class action litigants and the general public be afforded access to discovery materials whenever possible." *In re Agent Orange Product Liability Litigation*, 821 F.2d 139, 146 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987).

[1/] These issues arise in connection with, and the discussion below focuses exclusively on, discovery materials that are not filed with court in connection with motions or used as evidence at trial. When a judge or jury relies on information to adjudicate a matter, the presumption in favor of access is stronger than in the cases of other discovery materials. *See United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 782 (3d Cir. 1994); *Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 252-53 (4th Cir. 1988). We occasionally refer to such materials as "non-adjudicatory discovery materials."

Non-adjudicatory discovery materials may provide important information when civil litigation raises "issues crucial to the public." *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *see Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979). As the Advisory Committee notes in the proposed comments to Rule 26(c)(3), this public interest may be especially great in cases involving the conduct of government officials or allegedly dangerous products that may continue to cause injury. The public also has a legitimate interest in access to non-adjudicatory discovery materials to learn about the workings of the discovery process, a formal proceeding controlled by judicial rules.

2. Because of the broad sweep of discovery, discovery requests often, if not typically, cover information legitimately deserving of protection. There should be no general skepticism of the legitimacy of requests for protection, much less what the Advisory Committee refers to as "broad gauged hostility toward protective orders" (p. 96). Moreover, as the Advisory Committee states (p. 100), agreements on protective orders often cause parties to cooperate with discovery requests and to forego asking the court to resolve disputes about the scope of discovery.

3. As an empirical matter, in the overwhelming majority of federal cases, non-parties, including members of the press and the public, have no significant interest in discovery materials that do not become the basis or any judicial action. That is why non-parties rarely seek access to non-non-adjudicatory discovery materials.

4. Because requests for protection are generally appropriate, and privacy interests are generally not counterbalanced by a significant public interest in access, the parties should be given considerable discretion to regulate discovery without supervision by the court. The requesting party should accommodate reasonable requests for protective orders. Artificial obstacles to protective orders are not only unnecessary but harmful. Burdensome requirements on private parties to make non-adjudicatory discovery materials available to nonparties should be avoided.

5. In the relatively infrequent cases where nonparties have a legitimate interest in access to non-adjudicatory discovery materials, that interest should be effectively protected. The requesting party may not have an interest in protecting the interests of nonparties; for example, if the producing party refuses to produce documents without a protective order, the requesting party may agree even to an overbroad order simply to avoid substantial delays in the discovery process. Nonparties should therefore have a reasonable opportunity to seek access to non-adjudicatory discovery materials produced pursuant to a protective order.

We generally support the proposed amendments to Rule 26(c) because they are consistent with these principles.

1. We agree that courts should have the discretion to enter stipulated protective orders without a finding of good cause. This proposed change conforms the rule with current practice -- as a practical matter, judges do not try to second-guess parties who have agreed on a protective order. In all but rare cases, there is no need for judges to do so. The fiction that judges have done more than rubber-stamp a stipulated protective order containing a *pro forma* statement of good cause

may inappropriately increase the burden on parties or non-parties later seeking modification or dissolution the order. Moreover, it is not a productive use of judges' time to determine whether discovery materials warrant protection: the parties have better access to the information needed to make that judgment; and experience shows that nonparties rarely have an interest in non-adjudicatory discovery materials. However, judges should be alert to overly broad protective orders in cases where a strong public interest in apparent, and they should use their discretion to probe the need for sweeping protective orders in such cases.

2. The Section agrees that it would be appropriate for the Civil Rules to provide guidance to judges faced with requests to modify protective orders, sometimes long after they have been entered and the underlying case has been resolved through adjudication or settlement. The proposed amendment explicitly states that courts have the power to modify or even dissolve a protective order. Although it now appears reasonably well settled that courts have this power, *e.g.*, *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990); *Public Citizen v. Liggett Group*, 858 F.2d 775, 682-83 (1st Cir. 1988) (collecting cases), *cert. denied*, 488 U.S. 1030 (1989), the Section agrees that it is useful to confirm the existence of this power in the Civil Rules for the reasons stated in the proposed Advisory Committee note.

3. The Section agrees, and is unaware of any dispute, that the general factors listed in the proposed Rule 26(c)(3) are factors that courts should consider in exercising their discretion whether to modify or dissolve a protective order. We agree that any list of relevant factors cannot be all-inclusive because "the factors

that may enter the decision are too varied even to be foreseen" (p. 124). Nevertheless, the Section recommends three additional factors be added to the list: (a) whether any circumstances initially justifying the protective order have changed since its entry; (b) whether the order was entered by stipulation without a judicial determination of good cause, or based on a judicial finding of good cause after an opportunity for public comment; and (c) whether the case has been finally resolved. In addition, the rule should clarify that the party or nonparty seeking modification bears the burden of proof.

a. Consideration of changed circumstances may be implicit in consideration of reliance interests under proposed Rule 26(c)(3)(A), but it should be made explicit. Changed circumstances are relevant to modification of court orders generally -- whether entered by consent or after adjudication. *E.g., Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992). It would be appropriate to specifically include this factor here. Whether circumstances have changed since the order was entered is relevant whether the order is entered with or without a judicial finding of good cause.

b. Whether the order was entered by stipulation or based on a judicial determination of good cause is another important consideration. If a judge made an affirmative finding of good cause after balancing the interests of the parties in confidentiality against the interests of nonparties in access, a party or nonparty later seeking modification or dissolution should bear a heavier burden. A protective order entered only by stipulation may not provide adequate protection for the

interest in access. The proposed Advisory Committee notes this factor (p. 126), but it should be explicit in the rule itself.

c. One practical factor relevant to dissolution or modification is whether the underlying case is over. If the case has been finally resolved by settlement or adjudication, the burden on a party or nonparty to obtain changes in a protective order should be greater. The parties, particularly parties that produced discovery materials, have a legitimate interest in finality, and except in relatively compelling circumstances, they should not have to spend more time and money on a case that they reasonably believed was over. This factor is interrelated with the question discussed below concerning agreements among parties to return or destroy discovery materials when a case is over.

Furthermore, the Rule should make clear with respect to modification of protective orders, as it presently does with respect to their initial entry, that the movant has the burden of proof. It may be implicit that the movant has this burden, but it should be made explicit. Like any order, an order entered pursuant to Rule 26(c) should not be lightly set aside. This allocation of the burden of proof is consistent with the general rule that the moving party has the burden. It is also appropriate as a means to protect the reliance interest of the party providing discovery materials, particularly when a protective order entered only after a judicial finding of good cause and not merely on stipulation.

4. The draft acknowledges the availability of intervention by non-parties without specifying a standard by which such intervention motions should be adjudicated. The proposed Notes describe (p. 124) a relatively permissive standard:

"A motion to intervene for this purpose need not meet the technical requirements of Rule 24. It is enough to show that the applicant has a sufficient interest to justify consideration of the motion." We agree with this approach, which, as the proposed Notes state (p. 124), is "supported by the practice that has developed through a long line of decisions." Because one of the purpose of Rule 5 and Rule 26 is to protect the interests of similarly situated litigants and the public generally in access to discovery materials, the court's focus should not be on technicalities of intervention, but on whether a non-party seeking intervention has carried its burden to show that interests in access outweigh the producing party's privacy interests and that the order should be modified or dissolved. We are not aware of any significant problems or complaints that intervention standards are too permissive or too restrictive.

5. As the Advisory Committee observes (p. 96), these issues involved a "closely laced and interrelated set of interest reconciliations." Changes in Rule 26(c) must be evaluated in light of their practical effect, taking into account how discovery is actually conducted on a daily basis in federal courts around the country. This practical effect depends in significant part on what discovery materials are actually filed with the court under Rule 5 and related local rules, and on what happens to non-adjudicatory discovery materials after a case is over.

The practical reality is that in most districts (directly contrary to the 1980 amendment of Rule 5), local rules preclude the filing of discovery materials with the court except in connection with motions and trials. The most significant consequence is that court files do not provide access to deposition transcripts.

Nonparties may have a substantial interest in deposition transcripts, but generally less in interrogatory answers or other discovery materials generally subject to the filing requirement under Rule 5(d), because they are drafted by lawyers.

Nor do nonparties have access in court files to another kind of discovery in which the public interest may be substantial -- the internal documents of a party, including internal company memoranda concerning the dangerousness of products or environmental hazards. The Federal Rules have never required that a party file with the court internal documents produced in discovery under Rule 34, and have never contemplated access to such documents through clerks' offices.

Because deposition transcripts, internal documents, and other discovery materials are not accessible to nonparties through clerks' offices, their availability depends on the willingness of parties to make them available. Even if the requesting party is not restricted by a protective order from making such materials available, it may be restricted by a private agreement unregulated by the court. The Advisory Committee acknowledges (p. 100) that "the parties can agree to exchange information entirely outside the channels of formal discovery." As a result, parties may not make non-adjudicatory discovery materials available even if a protective order (or dissolution of a protective order) permits them to do so. Or the requesting party may simply be unwilling to take the time to accommodate a request by a nonparty. In these circumstances, to the extent that discovery materials are not filed with the court, or the court does not retain after termination of action discovery materials that were filed, whether a protective order should be

modified or dissolved at the request of a nonparty may be entirely academic and without any practical consequences.

The Advisory Committee is separately addressing whether and how to regulate agreements to return or destroy discovery materials that are not filed with the court (p. 101). We recommend that the Civil Rules should not require parties to make available to nonparties non-adjudicatory discovery materials not subject to a protective order. Parties should not be required to function as private clerk's office. Such an approach would create significant practical problems: what limitations would there be on the obligation to make an office or conference room available at a busy law firm? at what times should a private party make materials available? who should bear the costs of copying?

Consistent with this view, we believe that neither producing nor requesting parties should be required to maintain after a case is over discovery materials not filed with the court, even though the effect may be to make these materials unavailable to nonparties. A general rule requiring any party to retain non-adjudicatory discovery materials after a case is over would impose significant burdens and costs. A case should be over when it is over between the parties. Discovery rights exist only to permit parties to prepare for trial, so once the litigation is over, the requesting party's interest in keeping discovery materials ends. Nor should the federal rules become a federally mandated document retention policy. Storage of documents costs money, and requiring the producing party to keep discovery materials if the requesting party returns or destroys them after the case is over would create significant practical problems. Parties have obligations to retain docu-

ments subject to discovery requests, and perhaps to some decree in anticipation of discovery requests. But Rules 5 and 26 should not expand those obligations.

In specific and exceptional cases, courts may have the power to require parties (a) to make available to nonparties non-adjudicatory discovery materials or (b) to maintain such discovery materials after the conclusion of a case in specific cases. During the pendency of a case in which there is a strong public interest, and based on an appropriate showing that the requirement would not be unduly burdensome, it may, or may not, be appropriate for a court to require a party to make non-adjudicatory discovery materials available to nonparties for inspection and copying under appropriate terms and conditions. There may be a significant public interest in access to such discovery materials after a particular case is over, for example, when the underlying dispute involved continuing issues of public concern (such as environmental hazards or product safety). But any such power should be exercised only in extraordinary cases.

Because discovery may become increasingly regulated by private agreements rather than by protective orders, and because the effect of existing and new rules concerning protective orders depends on the content and scope of these private agreements, the Advisory Committee may wish to treat these related issues on a comprehensive, integrated basis. Specifically, the Advisory Committee should consider whether to complete its on-going analysis of agreements to return or destroy unfiled discovery materials before recommending adoption of the proposed changes to Rule 26.

Civil Rule 47(a) and Criminal Rule 24(a) - Attorney Voir Dire

The Section strongly supports the proposed amendments to Civil Rule 47(a) and Criminal Rule 24(a) to allow the parties, through their counsel, to participate in the examination of prospective jurors. We believe the proposed amendments represent a reasonable middle ground between the extremes of unrestricted attorney voir dire on the one hand, and a complete ban on attorney voir dire on the other. Attorney participation, within reasonable bounds established by the district court in its discretion, will help to promote the confidence of litigants and the public in our jury trial system.

The proposed rule changes are timely. As the Advisory Committee observes, constitutional limitations on the use of racial or gender stereotypes in jury selection in both civil and criminal cases "enhance the importance of searching voir dire examination to preserve the value of peremptory challenges and buttress the role of challenges for cause." Parties must have means to acquire information about an individual juror that is relevant to the juror's ability to decide a case fairly.

Allowing attorneys to participate in the examination of jurors presents several advantages over judge-only questioning. First, the attorneys "know the case better than the judge can, and are better able to frame questions that will support challenges for cause or informed use of peremptory challenges." For example, the attorneys may be more aware of the relative importance of a particular issue in the trial of case, and may explore that issue more fully than the trial judge. Compared to a judge who has not seen or heard the witnesses, the attorneys may be more

sensitive to the ways jurors' backgrounds, experiences and attitudes may affect their assessment of witness credibility. Potential prejudice against an important witness may be hard for a judge to assess and to probe.

Second, as the Advisory Committee note to proposed Criminal Rule 24(a) observes, social scientists have shown that jurors may respond more candidly and completely to questions asked by attorneys than by judge. When questioned by the judge, prospective jurors search for clues to the "right" answer, rather than disclosing attitudes that relate to their ability to be impartial jurors in the case.

Third, it may be difficult for a judge to formulate a question designed to elicit bias or preconceptions without appearing to favor one side or the other. The tendency is, therefore, frequently to ask "leading" questions of jurors that evoke a yes or no response and elicit little information. Lawyers for the parties can, instead, ask open-ended questions that produce much more information relevant to challenges for cause and peremptory challenges, without, for example, implying judicial approval or disapproval of a lifestyle, point of view, or activity.

The Section agrees that the proposed rule changes "need not mean prolonged voir dire, nor subtle or brazen efforts to argue the case before trial." The district judge retains ample discretion to cut off questioning. This gives the parties the incentive to be selective in their questioning, and to use wisely the limited right of participation extended in the rule.

The Section believes that attorney participation in jury selection should be increased even if peremptory challenges were to be abolished. At present, peremptory challenges serve as a "backstop" for challenges for cause. A

judge may decline to excuse a juror for cause in a close case, believing that the party can protect the integrity of the trial by exercising a peremptory challenge. Abolition or limitation of peremptory challenges would make the exercise of challenges for cause even more important. Allowing attorneys to participate in jury selection will provide the court with better information to use in making decisions about challenges for cause. One of the results of *Batson* and its progeny has been to make peremptory challenges more like challenges for cause, because challenges must often be based on articulable reasons than "bare looks and gestures."

Civil Rule 48 - Twelve-Member Juries

The Section welcomes the proposal to restore the requirement of a twelve-member jury in federal civil cases. The jury is, next to the ballot itself, the most important civic institution in our democracy. Participation in jury service is one the most important opportunities and obligations of citizenship. Especially during a time when the percentage of the population voting continues to decline, and alienation from the electoral process appears to be increasing, it is important to involve citizens in self-governance through our jury system. The Framers of the Constitution believed that our liberties depended upon the vitality of the jury system as a check upon the branches of government. Increasing the size of federal civil juries will increase citizen participation in this cherished institution.

Increasing participation in jury service by increasing jury size will also tend to bolster confidence in the legal system. Today, many people rely upon the entertainment and news media for an understanding of the judicial system.

Fundamental concepts such standards of proof, admissibility of evidence, and the function of the jury are sometimes distorted by writers, commentators, and reporters for dramatic effect. By giving citizens a better understanding of what judges, juries and lawyers actually do, jury service advances public confidence in the justice system.[2/]

[2/] We note that twelve-person civil juries in federal courts are not necessarily appropriate for the local court in the District of Columbia. By statute, the Superior Court of the District of Columbia generally follows the Federal Rules of Civil Procedure. The District of Columbia courts can address at the appropriate time whether any special circumstances justify continued use of six-person juries in the Superior Court. The interest in nationally uniform federal rules, and the relatively small volume of federal civil trials, justify application of the amended federal rule to the federal district court here.