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

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

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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.

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The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has solicited comments on various proposed 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, 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. The Section has a standing Committee on Court Rules, 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.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 21: Mandamus Petitions

The Section supports the proposed amendments to Rule 21 that would treat petitions for writs of mandamus directed to a court as adversary proceedings between the parties rather than as proceedings directed to an individual judge. Mandamus petitions seek appellate review of district court's decisions, and differ from appeals only in terms of procedural posture and standard of review.

We agree that district judges should not be given the option to participate in mandamus proceedings, and that if an appellate court believes that the prevailing party below cannot adequately defend the challenged decision, it should appoint separate counsel as *amicus curiae*.

Rule 27: Motions

We generally agree with the proposed amendments to Rule 27. However, we strongly urge one additional change.

The proposed revision of Rule 27 would leave unchanged the current requirement that oppositions to motions are due seven days after service of the motion. This seven-day period is adequate for non-dispositive motions. However, additional time is appropriate for dispositive motions for summary affirmance or reversal. Many Circuits now resolve a substantial percentage of appeals on motions for summary affirmance or reversal. The movant controls when such a motion is filed. Seven days is an extraordinarily short period of time in which to respond -- far shorter than the time normally permitted under local District Court rules to respond to motions, especially dispositive motions. Even if the opposition is relatively straightforward and requires only modifying and updating district court briefs (which is often not the case), it is frequently difficult for counsel with other responsibilities to complete this task within seven days. The burden is even greater when, as periodically happens with both private and governmental litigants, a different lawyer represents a party on appeal than in the trial court.

The problem could be alleviated to some extent if extensions of time were generously granted. Such an approach, however, would place a significant burden on already understaffed clerk's offices, particularly given the short time within which a ruling on the motion for an extension of time would be needed.

For these reasons, we propose that the time to respond to dispositive motions be twenty-one days. The time to respond to other motions (for example, motions for stays) would continue to be seven days.

Rule 32: Briefs

We agree that the length of briefs and other papers should be primarily governed by limits on the number of words and by general rules concerning the layout of pages. However, the proposed amendments are overly detailed and confusing to practicing attorneys not versed in typographic issues. For example, the requirement in proposed Rule 32(a)(1) of "a clear black image on white paper" makes unnecessary the further requirement of "a resolution of 300 dots per inch or more." Many of us do not know what the latter provision means, but we do know when a brief is legible. Less technical requirements would be sufficient and promote compliance.

We also object to the requirement in proposed Rule 32(a)(6) that a brief be accompanied by a certification of compliance with the proposed word limits, unless the brief falls within specified safe harbors. The rule could appropriately provide (similar to the provisions of Rule 11 of the Federal Rules of Civil Procedure) that by filing a brief, an attorney certifies that the brief complies with

all applicable substantive and procedural rules. However, a provision requiring a separate certification limited to compliance with word limits is unnecessary and implicitly demeaning to the integrity and professionalism of lawyers. The Federal Rules of Appellate Procedure do not require a certification of compliance with any other requirement, even when a violation may not be obvious from the face of a brief. There is no reason to think that counsel would be any more willing to violate the proposed rule on word limits than to violate any other rule -- including more substantive rules compliance with which is essential to the proper working of the appellate process. Nor does it seem likely that the certification requirement would effectively deter counsel who might otherwise be inclined to try to slip in extra words.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16: Discovery of Witness Names, Addresses and Statements[1/]

We agree with the basic premise of the proposed amendment to Rule 16: in general, pretrial discovery of the names, addresses, and statements of both prosecution and defense fact witnesses makes trials fairer and more efficient and facilitates appropriate resolutions before trial. Pretrial discovery permits both sides to prepare properly for trial, and it minimizes surprise and reduces interruptions at trial. In addition, when plea bargaining is informed, it is more likely to be successful. For these reasons, pretrial discovery is common in many jurisdictions, and the

1/ Eric H. Holder, Jr., Carol A. Fortine, and David A. Reiser do not join in these comments concerning Rule 16.

practice of many federal prosecutors is to provide discovery despite the absence of any requirement in the Federal Rules.

However, as the Advisory Committee recognizes, the names, addresses, and statements of fact witnesses should not be given to a defendant before trial if such disclosure would create any realistic threat of obstruction of justice or to the safety of witnesses. This is not merely a theoretical concern. For example, in recent years in the District of Columbia (which does not currently require pretrial disclosure of this information by prosecutors), prosecution witnesses have been threatened and even killed. However, in the substantial majority of state and local jurisdictions that mandate pretrial discovery, this discovery is managed in a way that has not appeared to increase the risk to witnesses. Moreover, these jurisdictions have implemented pretrial discovery even though they handle most cases involving violent crimes and even though cases involving violent crimes are more likely to generate threats to government witnesses than other criminal cases do.

The challenge is to devise a rule that implements the presumption of disclosure while providing ample protection for witnesses. The Advisory Committee has recommended what it calls a "middle ground." The proposed amendment would give prosecutors maximum conceivable discretion to withhold from the defense information about government witnesses -- prosecutors would have sole and unreviewable authority to determine whether discovery would create any danger to potential witnesses. In contrast, most local jurisdictions, and the American Bar Association's Standards for Criminal Justice, provide for judicial review and approval of such prosecutorial decisions through protective orders. To our

knowledge, this procedure has not resulted in unwarranted disclosure of witness names, addresses, or statements (because judges do not want to put witnesses at risk any more than prosecutors do), nor has it spawned excessive satellite litigation.

Nevertheless, while there may be advantages to a procedure requiring prosecutors to obtain a protective order before withholding otherwise discoverable information, we understand the reasons why the Advisory Committee recommended a different approach. We believe that it is appropriate to try this approach and determine how it works in practice. The Advisory Committee's commitment to carefully monitor implementation of the proposed rule is essential. If a substantial concern develops about whether prosecutors are properly exercising their discretion, the Advisory Committee should reconsider whether a protective order procedure should be used.

Two additional points deserve mention. First, the Advisory Committee states that a prosecutor's good faith belief as to danger does not require "hard" evidence of actual danger, and also that the prosecutor must provide written reasons based upon the facts relating to the "individual case." These statements, and the relationship between them, should be explained and clarified. Even if the prosecutor does not have information that the defendant, or other members of an alleged criminal organization, made threats relating to potential government witnesses, the prosecutor may have a good faith belief based on evidence, for example, of past violence by members of the alleged organization or intimidation by similar organizations in similar kinds of cases. If the proposed rule is adopted,

prosecutors should not have to worry that their good faith will be challenged if they act on the basis of such reasonable concerns.

Second, although the proposed rule specifies that the government must provide discovery within a specified time before trial (seven days), it contains no comparable requirement for the defense. We suggest that Rule 16 require the defense to provide its reciprocal discovery no more than three days before trial.[2]

FEDERAL RULES OF EVIDENCE

In 1990, our Section proposed Rules of Evidence for the Superior Court of the District of Columbia, the local court of general jurisdiction in Washington. Our proposed Rules generally tracked the Federal Rules of Evidence, but suggested changes in appropriate cases. As the Advisory Committee on the Federal Rules of Evidence considers whether and how to amend particular Federal Rules of Evidence, it may wish to consider our recommendations. We have attached our proposal to these comments.

The Advisory Committee sought comment on its tentative decision not to propose amending twenty-five specified Federal Rules of Evidence. In these comments, we address the three Rules in this group that we believe should be

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[2] Under § 11-946 of the District of Columbia Code, the Superior Court of the District of Columbia, which is the local trial court of general jurisdiction, follows the Federal Rules of Criminal Procedure unless it affirmatively decides not to do so. Whether the proposed amendment to Rule 16 would be appropriate for the Superior Court is a question that we do not address or express any opinion about here. A determination about whether the Superior Court should or should not follow the proposed rule would depend on evaluation of the particular characteristics of its caseload, current discovery practices, and any other special circumstances in this jurisdiction.

amended. We agree with the Advisory Committee that the remaining twenty-two Rules in this group should not be amended for federal courts. We note that changes we recommended in 1990 to a few additional rules in this group of twenty-five may still be appropriate for local District of Columbia courts because of particular local circumstances.

Rule 409 - Payment of Medical and Similar Expenses

We recommend a qualification to the general rule that evidence of furnishing or offering to pay medical, hospital, or similar expenses occasioned by an injury is inadmissible to prove liability for the injury. Such evidence should be admissible if the circumstances indicate not merely an act of benevolence but some admission of fault. The evidence would be presumptively inadmissible, and the burden would be on the proponent to make an affirmative showing that the evidence should be admitted to prove liability. Proposed language is set forth on page 43 of the attached Proposed Rules of Evidence for the Superior Court.

Rule 601 - General Rule of Competency

We agree with the general presumption that witnesses are competent. However, the trial court should have the discretion to hold a hearing to make a threshold determination of competency if a significant question is raised about the capacity of a witness to testify truthfully or to recall accurately. Proposed language containing specific guidelines for the trial judge is set forth on page 65 of the attached Proposed Rules.

Rule 613 - Prior Statements of Witnesses

We recommend requiring the party examining a witness about a prior inconsistent statement to lay a foundation about the circumstances of the prior statement and to give the witness an opportunity to explain. This change would constitute a return to federal practice before adoption of Rule 613. This foundation aids the finder of fact in evaluating the impact, if any, of the inconsistency on the credibility of the witness. It also prevents counsel from discrediting a witness because of confusion about when a statement was made, rather than because of the substance of the statement. It also takes little time to lay a foundation. Suggested language is set forth on page 93 of the attached Proposed Rules.