COMMENTS OF THE COMMITTEE ON COURT RULES OF DIVISION IV OF THE DISTRICT OF COLUMBIA BAR ON PROPOSED AMENDMENTS TO SUPERIOR COURT CIVIL RULES 6, 7, 11, 16, 26 AND 67

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The views expressed herein represent only those of Division IV: Courts, Lawyers and the Administration of Justice, of the D.C. Bar and not those of the D.C. Bar or of its Board of Governors.

SUMMARY

The Division 4 Rules Committee in the attached comments analyzes proposed amendments to Superior Court Civil Rules 6, 7, 11, 16, 26 and 67. These rules deal with motion for enlargement of time, signing of pleadings by counsel, sanctions for pleadings not well founded, pretrial conferences, discovery and deposit of funds in to the Court Registry.

The Rules Committee largely supports the proposed amendments with some suggestions for minor changes, the notable exception being the proposal to restrict discovery more than undercurrent D.C. Superior Court Rules.

The Committee on Court Rules of Division IV of the District of Columbia Bar (Courts, Lawyers and the Administration of Justice) submits the following comments regarding the proposed amendments to Superior Court Civil Rules 6, 7, 11, 16, 26 and 67.

The proposed amendments in large part are based on the amendments to the Federal Rules of Civil Procedure which became effective August 1, 1983; however, there are a number of departures from the Federal Rules.

As discussed below, the Committee supports the proposed amendments in most respects, but not completely. Most significantly, the Committee notes several ambiguities in Rule 16 which it recommends be clarified, and opposes much of the proposed amendments to Rule 26.

Division XVIII of the D.C. Bar (Litigation) has reviewed these Comments and concurs in them.

Rule 6

Superior Court Civil Rule 6(b) deals with motions for enlargement of time generally, and prohibits the enlargement of time in which to file certain motions. The proposed amendment would expressly prohibit the enlargement of the time in which a party may move for a new trial, pursuant to Rule 50(c)(2), after a verdict has been set aside on j.n.o.v. Rule 6(b), as amended, would be identical to amended Fed. R. Civ. P. 6(b), effective August 1, 1983.

The proposed amendment makes express what is already implicit in the existing rule. Under present Rule 6(b), the time

to move for a new trial under Rule 59 may not be enlarged. Rule 50(c)(2) authorizes a party to "serve a motion for a new trial pursuant to Rule 59" after a verdict has been set aside on j.n.o.v. (Emphasis added.) Rule 50(c)(2) thus appears to operate within the limits imposed on Rule 59 by Rule 6(b).

In view of the policy favoring finality of judgments, and the fact that the proposed amendment merely clarifies existing law, the Committee supports this change.

Rule 7

The proposed amendment adds a provision to Superior Court Civil Rule 7(b), as subsection (3), that: "All motions shall be signed in accordance with Rule 11." The amendment parallels the change made in 1983 to Fed. R. Civ. P. 7(b)(3).

The new language is intended to make explicit that Rule 11's certification requirement and the sanctions for breach of that requirement apply to motions as well as other pleadings. Under the existing Superior Court rule, and the former Federal rule, there had been a lack of clarity regarding the applicability of sanctions under Rule 11 to improper motions practice. See Advisory Committee Note to Fed. R. Civ. P. 7, 97 F.R.D. at 196; 5 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1191 at 4 (Supp. 1984); 2A J. Moore & J. Lucas, MOORE'S FEDERAL PRACTICE ¶ 7.05 n. 27 (2d ed. 1984).

The Committee supports the proposed amendment.

There is one minor respect in which Rule 7, as amended under the present proposal, would differ from Fed. R. Civ. P. 7 as

amended in 1983. In the amended version of the Federal Rule, the word "signing" was eliminated from subsection (b)(2)[1/] because the addition of subsection (b)(3) rendered it superfluous. A corresponding amendment to Superior Court Rule 7(b)(2) has not been proposed. Although the point is not a major one, we recommend that Rule 7(b)(2) be amended to correspond to the parallel Federal rule.

Rule 11

With a few minor exceptions, the proposed amendments to Superior Court Civil Rule 11 reflect the substantial changes to Fed. R. Civ. P. 11 made in 1983. As the Federal Advisory Committee explained, the revised language of Rule 11 "is intended to reduce the reluctance of courts to impose sanctions . . . by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions." Advisory Committee Note to Fed. R. Civ. P. 11, 97 F.R.D. at 198.

Revised Rule 11 eliminates the nebulous good faith standard under which an attorney certified that he or she had "good ground to support" a pleading or other paper and that it was "not interposed for delay." In its place, the amended Rule contains a facially more stringent standard that requires the signer to certify that the submission "to the best of the signer's knowledge, information and belief formed after reasonable inquiry

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1/ Fed. R. Civ. P. 7(b)(2) provides: "The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules."

. . . is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. . . ." (Emphasis added). See Advisory Committee Note to Fed. R. Civ. P. 11, 97 F.R.D. at 198-99; 2A J. Moore & J. Lucas, MOORE'S FEDERAL PRACTICE § 11.02[2] (2d ed. 1984). This language is designed to establish an objective test -- whether the signer's certification of a particular paper is "reasonable under the circumstances". Advisory Committee Note to Fed. R. Civ. P. 11, 97 F.R.D. at 198. The Advisory Committee Note also enumerates certain factors that a court should examine in weighing a signer's compliance with the "reasonable inquiry" standard:

> how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or other member of the bar.

97 F.R.D. at 199.

Revised Rule 11 also vests the Court with augmented, or at least more express, sanctions authority. Pursuant to amended Rule 11, if a pleading, motion or other paper is signed in violation of this rule, the Superior Court "shall impose . . . an appropriate sanction, which may include . . . reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee." Although such sanctions were previously within the inherent power of the court to impose, see Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), the amended Rule makes explicit this authority. 2A J. Moore & J. Lucas,

MOORE'S FEDERAL PRACTICE § 1102[2]. The new rule also clarifies that the court may impose sanctions on its own motion, see Golden Eagle Distributing Corp. v. Burroughs Corp., No. C-84-0523, slip op. at 2 (N.D. Cal. Sept. 18, 1984), a device evidently designed to encourage courts to detect and punish violations of the certification requirement. See 5 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1334 at 131 (Supp. 1984). In addition, the amended Rule provides expressly that whatever sanctions are ordered can be imposed upon counsel, his or her client, or both, depending on the particular circumstances of the violation. Advisory Committee Note to Fed. R. Civ. P. 11, 97 F.R.D. at 200.

Although the "shall impose" language in the altered Rule appears mandatory, it is clear that a judge retains, in the words of the Federal Advisory Note, "the necessary flexibility to deal appropriately with violations of the rule" including the power to tailor sanctions to the circumstances. Id. A party seeking to invoke the court's sanctions authority is expected to give prompt notice to the court and the party in violation after discovering a basis for doing so. Id. And in order to avoid a proliferation of satellite litigation over the imposition of sanctions, the Federal Advisory Committee cautions that, to the extent possible, courts should limit the scope of sanctions proceedings to the record already developed in those proceedings. Id. at 201; see 5 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1334 at 131 (Supp. 2984).

The present version of Rule 11 provides that if a pleading is not signed or is argued with intent to defeat the Rule, "it may be stricken as sham and false. . . ." Because this sanction was rarely used and tended to confuse the issue of the attorney's conduct with the merits of an action, it has been deleted from the new Rule. Advisory Committee Note to Fed. R. Civ. P., 97 F.R.D. at 199. The new Rule simply provides that an unsigned pleading or other paper "shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant."

The proposed amendments to Superior Court Rule 11 do contain certain minor variations from the revised Federal Rule. First, the language of the proposed amendments uses gender-neutral terms wherever possible in place of personal pronouns. Second, the proposed Superior Court Rule deletes the following language, which is contained in the present Superior Court Rule and is retained in the revised Federal Rule: "The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished." This language specifically abolished the archaic practice, which existed under the Federal Equity Rules (and under some state equity codes), that a verified answer must be overcome by the testimony of two witnesses or one witness and satisfactory corroborating circumstances. See Greenfield v. Blumenthal, 69 F.2d 294, 298 (3d Cir. 1934); 2A J. Moore & J. Lucas, MOORE'S FEDERAL PRACTICE § 1104 (2d ed. 1984). We assume that this deletion stems from the

conclusion that the rule in equity referred to in the quoted language is no longer the law in this jurisdiction, and that the deleted language would therefore be superfluous. On that basis, we support this departure from the Federal rule. If, however, our assumption is erroneous, we would favor including the deleted language.

It seems likely that the more precise standards of lawyer conduct established in amended Rule 11, coupled with the increased sanctions authority provided under the Rule, will do far more than the current version of Rule 11 to deter abuse of the litigation process. Accordingly, the Committee supports the proposed amendments to Rule 11.

Rule 16

The proposed amendments to Superior Court Civil Rule 16, covering pretrial conferences, scheduling and management, in many respects follow the 1983 revisions to Fed. R. Civ. P. 16. However, as the Comment accompanying proposed Rule 16 states, "a number of changes have been made to this Court's rule in order to reflect certain local practices in regard to local procedure." The Committee has several comments with respect to proposed Rule 16, as follows:

Paragraph (a). Fed. R. Civ. P. 16(a)(3) specifies that one objective of pretrial conferences is to "discourage wasteful pretrial activities." Of course, such an objective is both an intended and desirable effect of the procedures described in the proposed Rule; yet express mention of that objective is omitted

from the proposed Rule without explanation. In addition, Fed. R. Civ. P. 16(a)(2) specifies that one objective of the pretrial conference is to establish "early and continuing control." Proposed Superior Court Rule 16 states only the objective of "establishing continuing control."

We assume that the departures from the Federal rule in these respects stem from the fact that under the Superior Court's tracking system, pretrial conferences will generally be held at a later stage than may be the norm in Federal court, and there is less opportunity to exercise judicial control over each particular case at an early stage. However, the Committee feels that to whatever extent exercising early control and discouraging wasteful pretrial activities can be fostered consistent with the Superior Court's tracking system, they should be. Accordingly, we recommend that proposed Rule 16 be amended to include the language noted above contained in Fed. R. Civ. P. 16(a)(2) and (3).

Paragraph (c). Fed. R. Civ. P. 16(c) requires that "[a]t least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters." Proposed Superior Court Rule 16(c) requires attendance at conferences of "at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties." We assume that the Superior Court requirement is intended to be more stringent than the corresponding Federal rule, and that an attorney attending a Superior Court pretrial

conference must not only be one of the attorneys who will conduct the trial, but must also be authorized to enter into stipulations and make admissions. However, the Rule is not entirely clear in this regard. Accordingly, we recommend adding the language "who shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed," after the words "each of the parties" in the final paragraph of Rule 16(c).

With respect to the requirement of the last sentence of proposed Rule 16(c) -- that at the time of the pretrial conference all principals and represented parties must remain accessible, either at the courthouse or by telephone, in order to facilitate settlement -- which has no counterpart in the Federal rule, the Committee favors this requirement.

Paragraph (d). The second sentence of par. (d) provides: "The participants at any such [further] conference shall formulate a plan for trial, including a program for facilitating the admission of evidence." The Committee feels that what is to transpire at any second or subsequent pretrial conference should be left to the discretion of the judge directing that such conference be held and the judge actually conducting it. Accordingly, the Committee recommends that the second sentence of par. (d) be deleted.

Also, the sentence seems ambiguous. It is not clear whether the parties are to formulate a plan before the further conference, and in writing, or whether the provision simply describes what is to be done at the further conference.

Accordingly, if the provision is to be retained, the Committee recommends that it be clarified. If the intent is to simply describe what is to be done at the further conference, the sentence might be revised to read: "The participants at any such conference shall be prepared to discuss formulating a plan for trial . . . ."

Paragraph (e) The Committee recommends that par. (e)(1) be clarified to provide that a pretrial statement is to be filed only in advance of the first pretrial conference, and not also before each further conference. Any filings to be made in connection with further conferences should be only at the direction of the pretrial judge.

Also, the provision that pretrial statements must be filed and served at least five days before the conference, which is also contained in the existing rule, is often not observed. To ensure that parties timely obtain their opponents' pretrial statements, we recommend that a provision be added that if service is by mail, the statement must be mailed at least eight days before the conference. We also recommend that the Court more strictly enforce the filing and service requirements of par. (e)(1).

Paragraph (f) Par. (f)(1) provides that certain tasks relating to exhibits are to be completed no later than 30 days before trial. However, it is uncertain as to when these tasks are to be performed if the pretrial conference is held within 30 days of trial. (The Comment to par. (f) indicates that the specified tasks are to be performed after the pretrial

conference.) One way to resolve this uncertainty is to make the deadline the later of 30 days before trial, or 10 days after the pretrial conference (or such other time as the pretrial judge directs, if the pretrial conference is held within 10 days of trial).

Par. (f)(2) requires that proposed jury instructions be filed and served "within five (5) days before trial." It is not clear whether "within five (5) days before trial" was intended to mean at any time within the five days preceding trial, or at least five days before trial. This should be clarified. Also, for the same reasons as discussed under paragraph (e), we recommend adding a provision that if service is by mail, the instructions shall be mailed at least three days earlier than the service deadline otherwise prescribed.

Paragraph (g) The last sentence of par. (g) provides: "If the parties have failed to inform the Court within forty-eight (48) hours of the date of a pretrial conference that the case has been settled, the pretrial judge may also assess against the parties, their attorneys, or both, those sanctions specified in paragraph (i) of this rule." It is not clear whether sanctions are to be imposed (1) in any case in which a settlement is reached within 48 hours of the pretrial conference, or even at the conference, or (2) only in those cases in which a settlement was reached but the parties neglected to inform the judge thereof more than 48 hours in advance. Also, the bald reference to par. (i) leaves the questions of the nature and amount of the sanctions to be imposed extremely vague.

The Commitee would not favor the imposition of sanctions based merely on a case being settled within 48 hours of the pretrial conference, or at the conference, since one of the purposes of the pretrial conference is to promote settlement. Accordingly, we recommend that the sentence be deleted, or revised to provide that, at most, sanctions will be imposed if a case is settled more than 48 hours prior to the pretrial conference but the parties neglect to timely inform the Court of the settlewment. Also, the nature and amount of the sanctions to be imposed in this event should be specified.

Except as otherwise noted above, the Committee supports proposed Rule 16.[2/]

Rule 26

Superior Court Civil Rule 26 sets forth general provisions governing discovery. The proposed amendments are intended to strengthen the Court's power to limit abusive or oppressive discovery, and is to some degree a more pointed expression of already-existing rights. Under present Rules 26(c) and 37(a)(4), a party may move for an order protecting against discovery which is annoying, embarrassing, oppressive, or unduly burdensome or expensive. The party prevailing on the motion will be awarded the expenses incurred in connection with the motion, unless the Court finds that an award of expenses would be unjust. The

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2/ One member of the Committee expressed concern that proposed Rule 16, as well as the amendments to Rule 26, are unnecessarily detailed and tend towards making the District of Columbia a code rather than common law jurisdiction.

proposed amendments contain two significant new features, which are considered below.

Paragraphs (a) and (b). Under the proposed amendments, Rule 26 moves from a general presumption in favor of unrestricted relevant discovery towards the position that relevant discovery may be limited under the circumstances of the particular case. Under present Rule 26(a), "[t]he frequency of use of [discovery] methods" may be limited only upon motion for a protective order [Rule 26(c)] or by the discovery schedule established in Civil I and Civil II cases [Rule 26(d), (e)]. In the proposed amendment, this language is stricken from Rule 26(a), and new language is inserted in Rule 26(b) which provides that discovery may be limited by the Court sua sponte as well as on motion of a party.

For the first time, specific criteria are provided for setting limits on discovery. The Court shall limit discovery if it finds that:

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
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> (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
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> (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources and the importance of the issues at stake in the litigation.
> These changes parallel amended Fed. R. Civ. P. 26(a) and (b)(1), effective August 1, 1983.

The Federal Advisory Committee's note declares that these criteria reflect the existing practice of many courts in issuing protective orders. See 97 F.R.D. at 217. In fact, however, the new language appears to soften a present presumption against protective orders. While the Committee has discovered no D.C. cases construing Rule 26(c) (protective orders), the discovery rules generally are given "a broad and liberal" construction, and we look to federal cases for further guidance. Dunn v. Evening Star Newspaper Co., 232 A.2d 293, 295 (D.C. 1967); see Neuman v. Neuman, 377 A.2d 393, 398 (D.C. 1977).

Federal doctrine has historically favored liberal discovery. E.g., Hickman v. Taylor, 329 U.S. 495, 507 (1947) (rules accorded "a broad and liberal treatment"); Alimenta (U.S.A.), Inc. v. Anheuser-Busch Companies, Inc., 99 F.R.D. 309, 312 (N.D. Ga. 1983) (same); In re Hawaii Corp., 88 F.R.D. 518, 524 (D. Hawaii 1980) (broad discovery favored even in face of "weighty public policy interests"); Rorer Int'l Cosmetics, Ltd. v. Halpern, 85 F.R.D. 43, 45 (E.D. Pa. 1979) (discovery accorded "utmost liberality"); Novel v. Garrison, 42 F.R.D. 234 (E.D. La. 1967) (discovery is "a broad and powerful right"; presumption of unlimited right to discovery).

The policy in favor of complete pretrial disclosure has resulted in a number of cases holding that the opponent of discovery must make a showing of particular hardship to resist discovery. See, e.g., Alexander v. Parsons, 75 F.R.D. 536, 539 (W.D. Mich. 1977) (fact that discovery is burdensome is not enough to resist discovery); Lehnert v. Ferris Faculty Ass'n-MEA-

NEA, 556 F. Supp. 316, 318 (W.D. Mich. 1983) (protective order requires more than showing of inconvenience or expense); Isaac v. Shell Oil Co., 83 F.R.D. 428, 431 (E.D. Mich. 1979) (same); United States v. American Optical Co., 39 F.R.D. 580, 586-87 (N.D. Cal. 1966) (same).

These rulings sustain the policies underlying liberal discovery rules, which are too well-known and well-established to bear discussion here. On the other hand, numerous commentators in recent years have addressed the problems caused by "over-discovery" of a case, including the risk that a party of limited means may be forced out of court by reason of inability to bear the burdens of pre-trial discovery. A number of courts have tried to resolve the conflict by imposing presumptive limits on discovery. For example, many courts, including the Superior Court, have restricted the number of interrogatories or requests for admission that may be filed without leave of the court. (Superior Court Civil Rule 33(a) limits the number of interrogatories that may be propounded to 40.)[3/] Others, again

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3/ See D. Alaska Gen'l R. 8(C)(1) (20 interrogatories; more may be propounded after completion of depositions and upon application to the court); C.D. Cal. R. 8.2.1 (30 interrogatories); S.D. Cal. R. 230-1 (25 interrogatories or requests for admission); D. Del. R. 4.1.B(1), B(4) (50 interrogatories, 25 requests for admission); S.D. Fla. Gen'l R. 10I(5) (40 interrogatories); N.D. Fla. Gen'l R. 7(C) (50 interrogatories); M.D. Fla. Gen'l R. 3.03(a) (50 interrogatories); S.D. Ga. R. 7.4(a) (25 interrogatories); D. Hawaii R. 230-1(a) (no more than 30 interrogatories may be filed with the Complaint or within 20 days thereof); S.D. Ill. R. 15(a) (20 interrogatories); S.D. Ind. Gen'l R. 14(c) (30 interrogatories or requests for admission, excluding "requests relating to the authenticity or genuineness of documents in the aggregate"); N.D. & S.D. Iowa R. 2.3.32 (30 interrogatories); D. Kan. R. 17(d) (30 interrogatories); W.D. Ky. R. 11(c) (30 interrogatories, 30 requests for admission, plus (footnote continued)

including the Superior Court, have set fixed deadlines for the completion of discovery. (Superior Court Civil Rule 26(d) provides that discovery shall be completed within 120 days in Civil II non-jury actions, and 180 days in Civil II jury actions.)[4/]

While the Committee is sympathetic to the policy considerations underlying the proposed amendments, we oppose the proposed changes to pars. (a) and (b). The Committee feels that there should be a presumption in favor of relevant discovery, which may be circumscribed only upon a showing of specific oppression or hardship, and that present Rule 26(c) provides an adequate and preferable check on discovery excesses. It was felt, for example, that the rule may engender substantial unfairness by preventing litigants having well merited but

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interrogatories as to the identity of the respondent, his or her witnesses, and his or her willingness to supplement the responses); E.D. La. R. 7.1, 7A (25 interrogatories); W.D. La. R. 10.1(a)(1) (25 interrogatories); D. Md. R 6(B) (30 interrogatories); N.D. Miss. R. C-12 (2 sets of interrogatories: 1st set, 30 interrogatories; 2nd set, 20 interrogatories); W.D. Mo. R. 15K (20 interrogatories); E.D. Mo. R. 8 (20 interrogatories); D. Neb. R. 9C (50 interrogatories); D.N.M. R. 10(e) (50 interrogatories); D. Ore. R 230-1(a) (30 interrogatories); M.D. Pa. R. 402.8 (40 interrogatories or requests for admission); D.S.C. Order in re Interrogatories & Requests for Admission (50 interrogatories, 20 requests for admission); M.D. Tenn. R. 9(a)(2) (30 interrogatories); W.D. Tenn. R. 9(c) (30 interrogatories); E.D. Va. R. 11-1(A), (B) (30 interrogatories, 5 depositions); N.D. W. Va. R. 2.06(b) (30 interrogatories); E.D. Wisc. R. 7.03 (35 persons with discoverable information and the existence, location, or custodian of documents); D. Wyo. R. 7(f) (50 interrogatories)

[4/] See D. Del. R. 4.1.A (9 months); N.D. Ga. R. 181.11 (4 months); S.D. Ga. R. 7.1 (4 months); S.D. Miss. R. 11 (90 days); W.D. Mo. R. 15H (presumption of 180 days); D. Nev. R. 17(A) (150 days after date fixed by Clerk); D.N.J. Gen'l R. 15A (90 days); M.D. Pa. R. 406 (6 months); D.S.C. Order in re Pre-Trial Discovery (90 days); W.D. Wash. Civ. R. CR 16(b) (75 days); D. Wyo. R. 7(j) (90 days).

relatively small claims from obtaining the discovery necessary to prove their claims, because of a finding that the proposed discovery is too much trouble, albeit relevant. The Committee was also concerned that the proposed amendments would create more burden and expense for litigants and the Court than they save, by spawning endless motions regarding whether or not proposed discovery is reasonable under the circumstances.

Particularly since the Superior Court has adopted deadlines for the completion of discovery and limits on the number of interrogatories that may be propounded, there does not seem to be as great a need for the proposed amendments in the Superior Court as may exist in various sectors of the federal system. Also, we believe that discovery abuses are not nearly as prevalent in the Superior Court as they are in many federal courts. The Committee believes that these local peculiarities warrant divergences between Superior Court Rule 26 and the corresponding Federal rule. At the very least, we believe that the federal courts' experience with amended Fed. R. Civ. P. 26(a) and (b) should be carefully examined, over a longer period of time than has yet elapsed, before amending Superior Court Rule 26 to conform to the Federal rule.

The Committee also opposes the new language authorizing the Court to limit discovery "upon its own initiative." It was felt that judicial limitations on discovery, unsolicited by any party, do not serve the interests of judicial economy or of liberal

discovery.[5] The discovery rules start with the presumption that discovery will be conducted by the parties without recourse to the Court. This presumption is embodied in Superior Court Civil Rules 26(g) and 37(a) (motions for discovery conference and for order compelling discovery must be accompanied by certificate showing reasonable efforts to resolve discovery dispute), and by the local rules of many district courts requiring that discovery motions contain a showing of efforts made to resolve the dispute without judicial intervention.[6] A party who is proceeding pro se may in some cases require special protection of the

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[5] The Committee recognizes that these interests may be served by a thoughtfully conceived discovery plan, established and enforced by the Court after consultation with counsel. We submit that the discovery conference provided by Superior Court Civil Rule 26(g) permits the development of such a plan at the behest of a party or on the Court's initiative, and avoids the need for unsolicited protective orders.

[6] See D. Ariz. R. 11(b); C.D. Cal. R. 7.15.1 -.2; E.D. Cal. R. 114(c); N.D. Cal. R. 230-4(a), (b); S.D. Cal. R. 232-1; D. Colo. R. 403G; D. Conn. R. 9(d)(4); S.D. Fla. Gen'l R. 10D(7); N.D. Fla. Gen'l R. 6(B) (all motions); M.D. Fla. Gen'l R. 3.04(a); N.D. Ga. R. 91.62; S.D. Ga. R. 6.5(d); D. Haw. R. 230-4(a), (b); D. Ida. R. 7-105(b); C.D. Ill. R. 11; N.D. Ill. Gen'l R. 12(d); S.D. Ill. R. 14; N.D. Ind. R. 7(e); S.D. Ind. Gen'l R. 13; D. Kan. R. 17(k); W.D. Ky. R. 7(d); E.D. La. R. 3.11; M.D. La. R. 5D; W.D. La. R. 10.1(b); D. Me. R. 16(e); D. Mass. R. 15(e); E.D. Mich. R. 17a2; W.D. Mich. R. 28(a); D. Minn. R. 4C; N.D. Miss. R. C-6; S.D. Miss. R. 8E3; W.D. Mo. R. 15M; E.D. Mo. R. 7(C); D. Neb. R. 20I; D. Nev. R. 17(A)(4)(b); D.N.H. R. 14(c)(1); D.N.M. R. 10d; S.D. & E.D. N.Y. Civ. R. 3(f); E.D.N.Y. Standing Order on Effective Discovery in Civil Cases R. 6(a); W.D.N.Y. R. 17; N.D.N.Y. R. 46(a); M.D.N.C. R. 21(k); W.D.N.C. R. 8A; S.D. Ohio R. 4.7.1, 4.7.4; N.D. Ohio R. 3.04; N.D. Okla. R. 14(e); W.D. Okla. R. 14(e); E.D. Okla. R. 14(e); D. Ore. 230-2(a), (b); M.D. Pa. R. 402.6; W.D. Pa. 4(a)(2); D.P.R. R. 8M; D.R.I. R. 13(d); D.S.D. R. 4 § 8; M.D. Tenn. R. 9(e)(3); W.D. Tenn. R. 9(f); S.D. Tex. 14A (all motions); W.D. Tex. R. 300-5(h); N.D. Tex. R. 5.1(a) (all motions); D. Utah R. 9(h); E.D. Va. R. 11-1(J); E.D. Wash. R. 9; W.D. Wash. R. CR 37(g); N.D. Wa. Va. R. 2.07; E.D. Wisc. R. 6.02; W.D. Wisc. R. 8(d); D. Wyo. R. 7(i).

Court. But in cases where all parties are represented by counsel, their interests will be adequately protected by motions for protective order under Rule 26(c). Accordingly, we recommend that the proposed second paragraph of Rule 26(b)(1) be amended to read (deleting bracketed language and adding underscored language):

> The Court may act [upon its own motion or] pursuant to a motion under paragraph (c) or, in behalf of a party appearing without counsel, upon its own initiative.

Paragraph h. The proposed amendments add new Rule 26(h), which requires that discovery requests, responses, and objections be signed by at least one attorney of record or, if a party is acting pro se, by the party. The signature constitutes a certificate that the discovery document is:

> (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
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> (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
>
> (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If it is not signed, it may be stricken unless it is signed promptly after the omission is called to the attention of the party who offers it. Moreover, if certification is made in violation of the proposed rule, the Court may order appropriate sanctions, including attorneys' fees incurred because of the

violation. The amendment is identical to new Fed. R. Civ. P. 26(g), effective August 1, 1983, except that the D.C. rule is stated in gender-neutral terms, whereas the federal rule uses the masculine form.

The Committee opposes the portion of the proposed amendment concerning what the signature of a party or an attorney represents. The interplay of this rule with Rule 11 seems confusing, and it appears that Rule 11 adequately covers the subject. Also, the Committee feels that the rule as drafted is skewed too much towards ensuring that a party requesting discovery is acting in good faith, and not enough toward ensuring that a party responding to discovery request is complying with the rules and acting in good faith.

We note, finally, that par. (h) effects a significant change from present practice in requiring that an attorney (in addition to a party) sign discovery responses such as interrogatory answers. We support this change and recommend that it be emphasized in the official comment and otherwise publicized to ensure that attorneys comply with it.

Rule 67

Rule 67 as now constituted allows a party to deposit funds in dispute into the Registry of the Court. The proposed change clarifies that this right may be exercised by a party who maintains an interest in all or part of that sum. It also requires the Court order permitting the deposit to be served on the Clerk.

The Committee favors the proposed amendments.