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SECTIONS
DISTRICT OF COLUMBIA BAR



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

FROM: Carol Ann Cunningham *CAC*

DATE: August 28, 1992

SUBJECT: PUBLIC STATEMENT regarding Proposed Letter to the Judicial Conference of the United States on the Proposed Disclosure Amendment to Rule 26(a) of the Federal Rules of Civil Procedure by the Section on Courts, Lawyers and the Administration of Justice

Celia A. Roady
Chair, Council on Sections
Barbara J. Kraft
Vice Chair,
Council on Sections

Jamie S. Gorelick
D.C. Bar President
Mark H. Tuohey, III
D.C. Bar President-Elect
Katherine A. Mazzaferri
D.C. Bar Executive Director

Carol Ann Cunningham
Sections Manager

Enclosed please find for your immediate review a one-page summary of a public statement prepared by the Courts, Lawyers and the Administration of Justice Section. Copies of the full text will be provided upon request. If you wish to have this matter placed on the next Board of Governors' agenda on September 8, please call me at the Sections Office by 5:00 p.m. on Friday, September 4. I can be reached at (202) 331-4364.

Please note that according to the Guidelines regarding public statements (pp. 38-49) your telephone call "must be supplemented by a written objection lodged within seven days of the oral objection."

Enclosures

cc with full public statement:

Jamie S. Gorelick
Mark H. Tuohey III
Frederick D. Cooke Jr.
Celia A. Roady
Barbara J. Kraft
Katherine A. Mazzaferri

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

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

Brian Busey, Cochair
Donna M. Murasky, Cochair

Carol Elder Bruce
Carol Fortine
Eric H. Holder, Jr.
David A. Reiser
Donna L. Wulkan

August 27, 1992

Steering Committee of the
Courts, Lawyers and the
Administration of Justice
Section

STANDARD DISCLAIMER AND DISCLOSURE

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.

**Summary of Proposed Letter of
the Courts, Lawyers and
The Administration of Justice
Section to the Judicial
Conference of the United States**

The Courts, Lawyers and the Administration of Justice Section and the Court Rules Committee, which regularly monitors and comments on proposed changes in federal and local court rules, intends to submit a letter to the Judicial Conference of the United States on the proposed disclosure amendment to Rule 26(a) of the Federal Rules of Civil Procedure.

The letter notes that the Section previously submitted comments to the Committee on Rules of Practice and Procedure of the Judicial Conference on the proposed amendments to the Federal Rules of Civil Procedure, including proposed amendments to Rule 26(a). In those comments, the Section specifically opposed the automatic disclosure feature of the proposed amendments to Rule 26(a).

Following considerable debate, the Advisory Committee on Civil Rules forwarded a revised version of the proposed amendment to Rule 26(a) to the Committee on Rules of Practice and Procedure. That committee has, in turn, forwarded the revised version of the changes to Rule 26(a) to the Judicial Conference for approval, although the revised version has not been reissued for public comment.

The Litigation Section of the District of Columbia Bar intends to submit a statement shortly to the Judicial Conference requesting that the proposed disclosure amendment to Rule 26(a) be returned to the Committee on Rules of Practice and Procedure for further public comment and, thereafter, reconsideration. The Section on Courts, Lawyers and the Administration of Justice joins this request and endorses the Litigation Section's statement.

The Section believes that the new revised version of the disclosure amendment to Rule 26(a), while an improvement on the earlier proposed version, would result in a substantial change from current discovery practice. The revised version of the disclosure amendment simply does not address all of the significant concerns expressed in the Section's comments on the earlier version of that proposal. In view of the fundamental and far-reaching changes that would be effected by the proposed amendment, the Section believes that republication and reconsideration are warranted.

COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE SECTION



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August 27, 1992

Committees:
Court Rules
Legislation

The Chief Justice of the United States
William H. Rehnquist
Chairman, Judicial Conference of
the United States
811 Vermont Avenue, N.W.
Suite 713
Washington, DC 20544

Dear Mr. Chief Justice:

This letter is submitted on behalf of the Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar and that Section's Committee on Court Rules.^{1/}

In February 1992, this Section submitted comments to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States on the proposed amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Among those comments were comments on the proposed amendments to Rule 26(a) of the Federal Rules of Civil Procedure, as published for public comment by the Advisory

^{1/} 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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Committee on Civil Rules in August 1991. The Section opposed the automatic disclosure feature of the proposed rule.

The Advisory Committee on Civil Rules has now forwarded a new proposed amendment to Rule 26(a) to the Committee on Rules of Practice and Procedure. We understand that that Committee has, in turn, forwarded the new proposal to the Judicial Conference for approval. The new proposed rule has not been reissued for public comment.

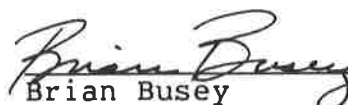
The Litigation Section of the District of Columbia Bar has adopted and is submitting a statement to the Judicial Conference of the United States requesting the Conference to return the proposed disclosure amendment to Rule 26(a) to the Committee on Rules of Practice and Procedure for reconsideration following an opportunity for public comment. The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar joins the request of the Litigation Section and endorses its statement in support of republication and reconsideration.


In addition, the Section on Courts, Lawyers and the Administration of Justice believes that the new version of the automatic disclosure proposal itself would effect a substantial change from current discovery practice and continues to raise significant issues worthy of public comment. Although the Section believes that the revision does represent an improvement over the original proposal, it does not, in our view, adequately address all of the concerns identified in our prior comments and in the comments of other members of the legal community.

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We look forward to an opportunity to provide detailed comments on the proposed amendments to Rule 26(a) to the Committee on Rules of Practice and Procedure in the event that the new proposal is republished for public comment.

Respectfully submitted,


Brian Busey
Donna M. Murasky *by BB*
Cochairs, Section on Courts,
Lawyers and the Administration
of Justice


Thomas C. Papson
Richard B. Nettler
Cochairs, Committee on Court Rules

cc: The Honorable Robert E. Keeton (Boston Chambers)
Professor Thomas E. Baker
The Honorable William O. Bertelsman
The Honorable Frank H. Easterbrook
The Honorable T.S. Ellis, III
Alan W. Perry, Esquire
The Honorable Edwin J. Peterson
The Honorable George C. Pratt
The Honorable Dolores K. Sloviter
The Honorable Alicemarie H. Stotler
The Honorable George J. Terwilliger, III
William R. Wilson, Esquire
Professor Charles Alan Wright
Dean Daniel Coquillette
Joseph F. Spaniol, Jr., Esquire

can provide the parties with a better opportunity to determine priorities and exercise selectivity in presenting evidence than when limits are imposed during trial. Any such limits must be reasonable under the circumstances, and ordinarily the court should impose them only after receiving appropriate submissions from the parties outlining the nature of the testimony expected to be presented through various witnesses, and the expected duration of direct and cross-examination.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

1 (a) Required Disclosures; ~~Discovery~~ Methods
2 to Discover Additional Matter.

3 (1) Initial Disclosures. Except to the
4 extent otherwise stipulated or directed by
5 order or local rule, a party shall, without
6 awaiting a discovery request, provide to other
7 parties:

8 (A) the name and, if known, the
9 address and telephone number of each
10 individual likely to have discoverable
11 information relevant to disputed facts
12 alleged with particularity in the
13 pleadings, identifying the subjects of
14 the information;

15 (B) a copy of, or a description by
16 category and location of, all documents,
17 data compilations, and tangible things in

18 the possession, custody, or control of
19 the party that are relevant to disputed
20 facts alleged with particularity in the
21 pleadings;

22 (C) a computation of any category
23 of damages claimed by the disclosing
24 party, making available for inspection
25 and copying as under Rule 34 the
26 documents or other evidentiary material,
27 not privileged or protected from
28 disclosure, on which such computation is
29 based, including materials bearing on the
30 nature and extent of injuries suffered;
31 and

32 (D) for inspection and copying as
33 under Rule 34 any insurance agreement
34 under which any person carrying on an
35 insurance business may be liable to
36 satisfy part or all of a judgment which
37 may be entered in the action or to
38 indemnify or reimburse for payments made
39 to satisfy the judgment.

40 Unless otherwise stipulated or directed by the
41 court, these disclosures shall be made at or
42 within 10 days after the meeting of the

43 parties under subdivision (f). A party shall
44 make its initial disclosures based on the
45 information then reasonably available to it
46 and is not excused from making its disclosures
47 because it has not fully completed its
48 investigation of the case or because it
49 challenges the sufficiency of another party's
50 disclosures or because another party has not
51 made its disclosures.

52 (2) Disclosure of Expert Testimony.

53 (A) In addition to the disclosures
54 required by paragraph (1), a party shall
55 disclose to other parties the identity of
56 any person who may be used at trial to
57 present evidence under Rules 702, 703, or
58 705 of the Federal Rules of Evidence.

59 (B) Except as otherwise stipulated
60 or directed by the court, this disclosure
61 shall, with respect to a witness who is
62 retained or specially employed to provide
63 expert testimony in the case or whose
64 duties as an employee of the party
65 regularly involve giving expert
66 testimony, be accompanied by a written
67 report prepared and signed by the

68 witness. The report shall contain a
69 complete statement of all opinions to be
70 expressed and the basis and reasons
71 therefor; the data or other information
72 considered by the witness in forming the
73 opinions; any exhibits to be used as a
74 summary of or support for the opinions;
75 the qualifications of the witness,
76 including a list of all publications
77 authored by the witness within the
78 preceding ten years; the compensation to
79 be paid for the study and testimony; and
80 a listing of any other cases in which the
81 witness has testified as an expert at
82 trial or by deposition within the
83 preceding four years.

84 (C) These disclosures shall be made
85 at the times and in the sequence directed
86 by the court. In the absence of other
87 directions from the court or stipulation
88 by the parties, the disclosures shall be
89 made at least 90 days before the trial
90 date or the date the case is to be ready
91 for trial or, if the evidence is intended
92 solely to contradict or rebut evidence on

93 the same subject matter identified by
94 another party under paragraph (2)(B),
95 within 30 days after the disclosure made
96 by the other party. The parties shall
97 supplement these disclosures when
98 required under subdivision (e)(1).

99 (3) Pretrial Disclosures. In addition
100 to the disclosures required in the preceding
101 paragraphs, a party shall provide to other
102 parties the following information regarding
103 the evidence that it may present at trial
104 other than solely for impeachment purposes:

105 (A) the name and, if not previously
106 provided, the address and telephone
107 number of each witness, separately
108 identifying those whom the party expects
109 to present and those whom the party may
110 call if the need arises;

111 (B) the designation of those
112 witnesses whose testimony is expected to
113 be presented by means of a deposition
114 and, if not taken stenographically, a
115 transcript of the pertinent portions of
116 the deposition testimony; and

117 (C) an appropriate identification

118 of each document or other exhibit,
119 including summaries of other evidence,
120 separately identifying those which the
121 party expects to offer and those which
122 the party may offer if the need arises.

123 Unless otherwise directed by the court, these
124 disclosures shall be made at least 30 days
125 before trial. Within 14 days thereafter,
126 unless a different time is specified by the
127 court, a party may serve and file a list
128 disclosing (i) any objections to the use under
129 Rule 32(a) of a deposition designated by
130 another party under subparagraph (B) and (ii)
131 any objection, together with the grounds
132 therefor, that may be made to the
133 admissibility of materials identified under
134 subparagraph (C). Objections not so
135 disclosed, other than objections under Rules
136 402 and 403 of the Federal Rules of Evidence,
137 shall be deemed waived unless excused by the
138 court for good cause shown.

139 (4) Form of Disclosures; Filing. Unless
140 otherwise directed by order or local rule, all
141 disclosures under paragraphs (1) through (3)
142 shall be made in writing, signed, served, and

143 promptly filed with the court.

144 (5) Methods to Discover Additional
145 Matter. Parties may obtain discovery by one
146 or more of the following methods: depositions
147 upon oral examination or written questions;
148 written interrogatories; production of
149 documents or things or permission to enter
150 upon land or other property under Rule 34 or
151 45(a)(1)(C), for inspection and other
152 purposes; physical and mental examinations;
153 and requests for admission.

154 (b) Discovery Scope and Limits. Unless
155 otherwise limited by order of the court in
156 accordance with these rules, the scope of
157 discovery is as follows:

158 (1) In General. Parties may obtain
159 discovery regarding any matter, not
160 privileged, which is relevant to the subject
161 matter involved in the pending action, whether
162 it relates to the claim or defense of the
163 party seeking discovery or to the claim or
164 defense of any other party, including the
165 existence, description, nature, custody,
166 condition, and location of any books,
167 documents, or other tangible things and the