

COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE SECTION



Sixth Floor
Street, N.W.
gton, D.C.
20005-5937
(202) 626-3463
FAX (202) 626-3453

The District of Columbia Bar

Sections EventLine
(202) 626-3455

Web Site Address:
[www.dcbbar.org/
pro_resources/sections](http://www.dcbbar.org/pro_resources/sections)

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Joy A. Chapper
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Court Rules and Legislation

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Strand
D.C. Bar President-Elect

Neil R. Ellis
Chair, Council on Sections

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Vice Chair, Council on Sections

Katherine A. Mazzaferr
D.C. Bar Executive Director

Cynthia D. Hill
D.C. Bar Assistant Executive
Director, Programs

Carol Ann Cunningham
Sections Manager

BRIEF SUMMARY OF 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 OF CIVIL PROCEDURE AND FEDERAL RULES OF EVIDENCE

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar, including its Committee on Court Rules, intend to submit comments concerning various proposed amendments to the Federal Rules of Civil Procedure, and the Federal Rules of Evidence which have been issued by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States for public comment.

FEDERAL RULES OF CIVIL PROCEDURE: The Section generally supports the proposed amendments to Federal Rules 4, 12, 14, and 37. With regard to Rule 5, the Section believes the Comment to the Rule should make clear that the change is not intended to change the principle that discovery materials should be available to the public when the public interest in access outweighs any countervailing privacy or other interest. With regard to Rule 26 and its proposed changes, the Section believes that, to the extent that initial disclosures are mandated, the initial disclosure process currently contained in Rule 26 is preferable to that proposed as a change. This is equally true with regard to the scope of discovery. As to Rule 30, the Section believes that there is no apparent reason why the existing ability of United States District Court Judges to grant relief from abuse in depositions is not an adequate remedy. Finally, as to Rule 34, the Section believes that there are already mechanisms in the Rules for dealing with unwarranted, unduly burdensome, or unduly expensive discovery requests, and that the proposed Rule change is not needed.

FEDERAL RULES OF EVIDENCE: The Section generally agrees with the proposed changes to Rules 103, 404, 701, 702, 803, and 902. With regard to Rule 703, which deals with testimony by experts, the Section believes that the Advisory Committee should indicate clearly in the Comments to the proposed Rule that a party need not seek a ruling of the court if the other party agrees that the probative value of the otherwise inadmissible testimony upon which the expert relies substantially outweighs its prejudicial effect.

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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 OF CIVIL PROCEDURE AND FEDERAL RULES OF EVIDENCE

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Richard A. Seligman
Arthur B. Spitzer
Anthony C. Epstein

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

William J. Carter, Chair
G. Brian Busey, Vice Chair

Committee on Court Rules
and Legislation

January 20, 1999

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 a draft of amendments to the Federal Rules of Civil Procedure, Admiralty 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 filing of discovery materials, initial disclosure, limits with regard to depositions, conditioning document discovery on payment of reasonable cost of production, and evidentiary rules concerning the basis for expert testimony.

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. Within the Section is a standing Committee on Court Rules and Legislation, whose responsibilities include serving as a clearing house 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 its Board of Governors.

FILING REQUIREMENTS

Civil Rule 5. Service and Filing of Pleadings and Other Papers

The Advisory Committee on Civil Rules has proposed an amendment to Rule 5, indicating that disclosures under Rule 26(a)(1) or (2) and depositions, interrogatories, request for production of documents or to permit entry upon land and requests for admission are not to be filed with the trial court, unless they are otherwise utilized in the proceeding or unless the court orders filing. The Notes indicate that the proposed change to the Rule is primarily one of a housekeeping nature, and reflects widespread experience of the United States District Court, in that they have enacted in their Local Rules, similar procedures.

The Section agrees with the proposed rule change. However, we suggest that the Advisory Committee make clear, perhaps in its Notes, that this house-keeping change is not intended to change the principle in the current Federal Rules of Civil Procedure that discovery materials should be available to the public when the public interest in access outweighs any countervailing privacy or other interest. See, *Citizen v. Liggett Group*, 858 F.2d 775, 789-790 (1st Cir. 1988) cert. denied, 488 U.S. 2030 (1989).

PROPOSED DISCOVERY CHANGES

In describing the proposed changes, which are indicated to be “somewhat major” (Memorandum from Paul Niemeyer, Chair Advisory Committee on Civil Rules, to the Honorable Alicemarie H. Stotler, Chair, Committee on Rules of Practice and Procedure (June 30, 1998)) (“Niemeyer Memo”) at 4, the Advisory Committee asserts that it has “not proposed reducing the breadth of discovery, nor have we intended to undermine the policy of full and fair disclosure in litigation. But while we have narrowed the scope of attorney-managed discovery, we have preserved the original scope under court supervision.” *Id.* A review of the proposed changes, however, suggests that the Committee has missed the mark of its intent as above described.

The proposed changes could be justified only if there are current problems with discovery that cannot be dealt with adequately by courts under current Rules. The research commissioned by the Advisory Committee does not support such a conclusion. For example, at the request of the Committee, the Federal Judicial Center undertook a study of discovery and published its results in *Willging, et. al., Discovery and Disclosure Practice Problems and Proposals for Change: A Case – Based National Survey of Counsel In Closed Federal Civil Cases* (Fed. Jud. Center, 1997). That study was based on a national survey of attorneys in closed civil cases. A representative sample of the studies findings indicates as follows:

Most attorneys – representing plaintiffs and defendants alike, thought the discovery or disclosure generated by the parties was about the right amount needed for a fair resolution of their cases. Fewer than 10% thought the process generated too little information and about 10% thought the process generated too much. (Page 4).

About half of the attorneys thought the expenses of discovery and disclosure were about right in relation to their client’s stake in the case. 15% thought the expenses were high and 20% said they were low. (Page 4).

Only 4% of the attorneys reported that too many depositions were conducted in their cares. (Page 7).

About 25% of the attorneys who had used depositions in the sample case (67% said they had) reported problems with this discovery tool.

The most frequent complaint (12% of those who use depositions) was that too much time was spent on a deposition.... The median length of the longest deposition was four hours, and 25% of the longest depositions took seven hours or more. (Page 7).

Document production, often said to be the most burdensome and costly part of discovery, typically involved rather modest cost. (Page 8).

The vast majority of attorneys (83%) found no problems with the court's management of disclosure or discovery. (Page 9).

The attorneys were then asked which of three approaches – more judicial case management, further rule revisions, or attention to attorneys' and clients' economic incentives, holds the most promise for reducing problems in discovery. About half the attorneys said increased judicial case management holds the most promise. Only about one-quarter called for revising the Rules to further control or regulate discovery, while the other quarter called for addressing the need for changes in client/attorney incentive. (Page 10).

It is fair to say that these research results do not demonstrate significant problems which currently exist in the discovery process.

The Committee's proposal to create two standards for discovery – one for attorney-managed discovery and the other court-managed discovery – is particularly worrisome. The only justification for the proposed change appears to be that it will force judges to become involved in managing discovery. One should be skeptical that judges who do not want to be involved in discovery at present would be more willing to become involved by Rules which would "force" a change. Instead, the effect of the proposed change is likely to be two-fold. First, it is an invitation to litigation over the difference between the two standards. Instead of saving costs, the proposed Rule is likely to simply shift cost to motions practice. In addition, to the extent the proposed Rule limits discovery, it is likely to make it harder to settle cases, harder to promote Alternative Dispute Resolution, and would result in more cases going to trial. Moreover, rulings on discovery issues are generally not immediately appealable, and the harms caused by inadequate discovery are likely irremediable.

Rule 26. General Provisions Concerning Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter

The proposed amendment would change the standard which currently exists in the Rule for identifying witnesses and documents, which are required to be disclosed to the opposing party fourteen (14) days after the Rule 26(f) conference is held. The current Rule requires that a party produce information which is "relevant to disputed facts alleged with particularity in the pleadings". The proposed Rule change indicates the parties must produce information "supporting [the disclosing party's] claims or defenses, unless solely for impeachment".

It would appear from a review of the Committee materials, that the proposed Rule change is a compromise. As there is not apparent support to extend the current initial disclosure Rule to all Districts on a mandatory basis, while eliminating any opt-out alternative for District Courts, the proposed change in standard with regard to initial disclosure is made. However, the form of mandatory initial disclosure proposed would prevent said disclosure from achieving its purpose: to exchange basic information about the lawsuit at the outset, thereby eliminating the need for at least some discovery and focusing that discovery which is remaining to be accomplished. Because the producing party would disclose, under the proposed Rule, only information favorable to its case, the other party would have no choice but to pursue extensive discovery to obtain information helpful to its case. The producing party's disclosure would provide little, if any, guidance about how to focus the discovery. Further, it would appear unlikely that the initial disclosure would facilitate settlement because the other side would want to inquire concerning what information the disclosing party might have in its possession which is harmful to its case. Surveys show that attorneys who are practicing under either an opt-out approach, or under the current discovery Rule are happy with the procedure. It would thus appear that the current approach should be maintained, requiring more comprehensive initial disclosure. That said however, the Section believes it should comment with regard to the proposed changes.

Upon initial review, it might appear that the proposed standard would be helpful in narrowing and focusing the scope of the material required to be disclosed. The amendment, as drafted, would require disclosure only of information that supports the disclosing party's claims or defenses, while the existing standard would arguably encompass all information "relevant" to facts alleged with particularity, and would include production of non-supportive or damaging material, as well as information which supports the disclosing party's claims. In a very simple case, the proposed standard might operate efficiently.

However, many cases are not simple, and the Section believes that the proposed standard would present complications. First, whether a particular document or witness generally helps or hurts a litigant's case is not always clear at

the outset of litigation (when initial disclosures in fact are required to take place) because the impact of the particular document or witness upon one's "claims or defenses" commonly will turn on a clarification of facts through the discovery process. Without this information which will only be gained later, the disclosing attorney must therefore take a position on the significance of certain evidence long before the theme or strategy underlying his or her case is developed, or the discovery by which to develop the strategy has been undertaken. This premature demand for an attorney's legal conclusions – to be disclosed at the peril of losing the right to use the subject information at trial – places upon the attorney and client an undue and unwarranted burden.

Secondly, whether a witness or document is "relevant to disputed facts alleged with particularity" is a relatively objective standard upon which to later form the basis for litigation, if necessary, concerning whether proper disclosure was made. However, for the reasons discussed above, whether a witness or document supports a disclosing party's claims or defenses is, to a far greater degree, a question of strategy and legal impression. Thus, the new proposed Rule provides a far more amorphous basis upon which to litigate the propriety of a party's initial disclosures. Attorneys litigating beneath a high standard to which most aspire could simply "determine" that the piece of information undisclosed until late in the litigation process was not "supportive" of his or her client's position until other evidence was developed and/or came to light. While there are few bright lines in the litigation of discovery issues, the extent to which certain information is "relevant" is far more manageable than whether it "supports a claim or defense".

Finally, the proposed standard would, in certain contexts, broaden the scope of that which would be required to be disclosed. Where, for example, a plaintiff challenges the constitutionality of regulations governing a federal program, how shall the defending attorney be held to disclose the identity of all witnesses and documents to support the defense that the regulations are constitutional? While each attorney is capable of making attempts as to determinations in such circumstances, the absence of clarity in the proposed standard would confuse, rather than streamline, the initial disclosure process.

Clearly, the proposed changes in their effort to limit initial disclosure would have no effect on the ultimate scope of discovery in any particular case. Traditional discovery tools still exist within the Rules and may be used to obtain whatever information was not disclosed in initial discovery. Further, it would appear that the proposed changes would require extensive discovery utilizing those discovery tools, because the only evidence produced would be that evidence which supports the litigant's "claims or defense". The party on the other side would then be forced to take discovery to determine whether there was any other "relevant" evidence in the possession of counsel who has made the disclosures, which would be detrimental or harmful to the support of the "claims or defenses". Thus, the Rule would not narrow the scope of discovery, but would, at the very least, call for discovery equal to that under the current Rules and likely call for even more

extensive discovery so that counsel to whom the initial information has been disclosed will be able to develop all facts and circumstances which have not yet been disclosed, but which may be in possession of the disclosing counsel.

The Section submits that the current Rule is satisfactory, and that it should be continued in force as written.

Rule 26. General Provisions Governing Discovery; Duty to Disclose
(b) Discovery, Scope and Limits

The proposed changes to this Rule adopt language akin to the proposed changes to Rule 26(a). Under this Rule, the scope of discovery obtainable without resort to the court would be confined to information "relevant to the claim or defense of any party." The Rule goes on to add that for "good cause shown" a court could order discovery of any information relevant to the subject matter involved in the action. The Notes indicate that the Committee, by its proposed Rule change seeks to address issues concerning overbroad discovery which include costs and delay.

As discussed above, the proposed changes seek to shift attorney managed discovery to court managed discovery. The likelihood that this will decrease litigation costs does not appear to be borne out, and is a clear invitation to litigation with regard to what falls within the parameters of attorney-managed versus court-managed discovery. As discussed above, the Section believes that the language contained in 26(b)(1) should not be changed to that proposed, as the proposed language would not result in the relief which the Committee appears to suggest could be obtained.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure
(c) Discovery, Scope and Limits
(2) Limitations

The proposed change in language to this Rule suggests that the United States District Court may by Local Rule limit the number of Requests for Admission pursuant to Rule 36. There is nothing in the materials cited by the Committee that suggests that this particular discovery device (Request for Admission) presents a problem under the current rule. In fact, the intent of Rule 36 is to streamline a case for trial and to require opposing parties to admit those matters about which there is no dispute, so that the trial proceeding may be conducted in a more efficient and cost effective manner. It would thus appear that utilizing the maximum number of valid Requests for Admission would be beneficial rather than detrimental.

Rule 30. Depositions Upon Oral Examination
(d) Schedule and Duration; Motion to Terminate or Limit Examination.

This Rule as currently written indicates that the United States District Court may by Local Rule limit the time permitted for conducting any deposition. The proposed change to the Rule indicates that unless authorized by the Court or stipulated by the parties and the deponent, a deposition is limited to one day of seven hours. It appears from a review of the background information cited by the Committee that few attorneys complained about depositions which were too lengthy. Thus the number of depositions effected by the Rule change would be small, and deponents and lawyers would thereby be encouraged to engage in delaying tactics. There is no apparent reason why the existing ability of the United States District Court Judges to grant relief from abusive depositions pursuant to the current Rules is not an adequate remedy.

The Section is divided with respect to whether, if Rule 30 is amended to include a presumptive seven-hour limit, the deponent should have an independent right to invoke this presumption, even if the parties agree the limit ought to be waived. Some members of the Section agree with the proposed amendment extending this independent right to non-party deponents. They believe that non-party deponents should have this right because neither party may have a sufficient interest in protecting such deponents' interests and the parties should take the initiative, and carry the burden, to justify longer non-party depositions. Other members believe that it is of questionable value to give the deponent such a right and that this requirement likely will inject yet another complication into the deposition process and lead to increased motions practice before the federal courts.

Rule 34. Production of Documents and Things and Entry Upon Land For Inspection and Other Purposes

(b) Procedure.

The proposed change to this Rule as indicated by the Advisory Committee would make clear that courts have authority to condition discovery on payment of reasonable expenses by the requesting party. The Section agrees with the proposed change. However, the Advisory Committee should make clear, perhaps in its Notes, that the change is not intended to affect the standard that judges apply in deciding whether to condition discovery on payment of reasonable expenses.

FEDERAL RULES OF EVIDENCE

The Advisory Committee has proposed a number of changes to various Federal Rules of Evidence. The primary thrust of these proposed changes deals with testimony by experts. The Section wishes to comment only on the proposed change with regard to Rule 703.

Rule 703. Bases of Opinion Testimony by Experts.

This Rule deals with testimony by experts, and more specifically deals with inadmissible testimony which forms a basis for the opinion of an expert. The

proposed change to the Rule shifts the burden to the proponent of the expert testimony to ensure that the otherwise inadmissible evidence will not be disclosed to a jury unless its probative value "substantially out-weighs" its prejudicial effect.

This new requirement makes it incumbent upon the proponent of the expert testimony to secure from the court, by Order or otherwise, a ruling that the probative value of the otherwise inadmissible evidence substantially outweighs its prejudicial effect. Under the Rule as currently proposed, even if the parties agree that the evidence may be utilized without objection, the proponent of the evidence will still have to secure from the court an affirmative decision or ruling before the matter can be disclosed to the jury because absent such a ruling, this otherwise inadmissible evidence "shall" not be disclosed to a jury.

The proposed amendment thus appears to encourage additional motions practice, and will require additional action by the trial court which under current practice is not required. The Notes which are included in support of the proposed rule change do not indicate that the current practice is inappropriate. One solution might be to have the Advisory Committee Notes clarify that a party need not seek a ruling of the Court if the other party agrees that the probative value of the otherwise inadmissible evidence substantially outweighs its prejudicial effect.