REPORT OF THE COMMITTEE ON COURT RULES OF DIVISION IV OF THE DISTRICT OF COLUMBIA BAR REGARDING PROPOSAL FOR NEW RULES FOR THE UNITED STATES DISTRICT COURT

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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."

INTRODUCTION

In its organizational meeting in late 1981, the Committee on Court Rules ("Committee") of Division IV of the District of Columbia Bar determined that it would be useful and appropriate to conduct a complete, general review of the civil local rules of the United States District Court for the District of Columbia ("D.C. District Court").*/ The Committee undertook this task after a number of members stated that, in their appearances in other Federal district courts, the members noted local rules which may be useful if adopted in this District. The Committee appointed a Federal Local Rules Revision Project ("Project"), which consisted of ten (10) members, to carry out the review.

The methodology used by the Project members was to review local court rules in other Federal district courts to determine those areas which should be studied more closely. Each member of the Project was responsible for reviewing the local rules of nine (9) district courts**/ and isolating those local rules which appeared useful. Ultimately, the Project reviewed all local rules which fell into the following eight areas:

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*/ Since there are other committees of Division IV responsible for criminal rules, attorney admissions, and court management, the Project limited its review to Title I ("Civil Rules"), Local Rules 1-1 to 1-32. The Project did not review Titles II, III and IV of the Local Rules which relate to these special areas within the jurisdiction of other committees.

**/ There are approximately ninety (90) district courts with published local rules.

1. rules requiring consultation prior to the filing of motions of any kind;

2. rules regarding the timing and filing of reply briefs;

3. rules setting procedures for video-taping of depositions;

4. rules relating to class actions, with particular emphasis on communications by counsel or class representatives with other members of the class;

5. rules prohibiting communications after verdict with jurors in civil trials;

6. rules relating to post-trial procedures such as attachment and garnishment;

7. rules limiting subpoenas on the highest level federal officials (e.g., President, Vice-President, cabinet members, etc); and

8. rules setting procedures for filing and issuance of temporary restraining orders and preliminary injunctions.

After this initial review, the Project held a series of meetings at which the members discussed the local rules of the other district courts in each of the above categories. This discussion led the Project to reject any new proposals relating to video-taping of depositions, class action, communications with jurors, post-trial procedures, and limiting subpoenas on high-level Federal officials. In each case, the Project concluded that the current D.C. Local Rule was equal or superior to other local rules and that no rule or

revision was necessary in these areas.*/

The Project did decide that three rule changes were appropriate in the areas of discovery motions practice, reply briefs, and oral testimony at hearings on motions for preliminary injunctions. The Committee reviewed the Project's recommendations and concurred in the suggested rule changes and analyses which are set forth below.

I. RULE REQUIRING CONSULTATION AMONG COUNSEL ON MOTIONS RELATING TO DISCOVERY

The Committee recommends that D.C. Local Rule 1-9 be amended to add a new section (i)**/ as follows:

> (i) Consultation among counsel. No motion concerning discovery matters may be filed until counsel for the moving party shall have consulted with opposing counsel regarding the possibility of resolving the discovery matters in controversy. All motions concerning discovery matters must contain or be accompanied by a signed statement of counsel for the moving party that a good faith effort has been made to resolve the discovery matters at issue.

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*/ The Project also discussed and rejected any local rule limiting discovery. Over 20 districts now have rules limiting the number of interrogatories which may be asked (e.g., D. Alaska R. 8; N.D. Ill. R. 9(g); D. Kan. R. 17(d); W.D. Tex. R. 26) or limiting the number of depositions that may be taken (e.g., E.D. Va. R. 11-1(B)) without approval of the court. The D.C. District Court has no such rule. The members of the Project unanimously believe that no such limit is appropriate or necessary in this District. Any abuses in the discovery process can be resolved by use of a discovery conference under Rule 27(f) and the other sanctions now available under the 1980 Amendments to the discovery rules.

**/ This would be renumbered to Rule 9(j) if the Committee's other recommendations, discussed in Part II below, are adopted.

DISCUSSION:

The Project's review of the local rules in other districts showed that numerous other district courts have adopted local rules requiring some form of consultation with opposing counsel prior to filing motions relating to discovery. See, e.g., E.D. La. Rule 3.11; D.N.H. Rule 14(c); D.N.J. Rule 126; D.N.M. Rule 10(d); S.D.N.Y. Civil Rule 3(f); D. Ariz. Rule 11; D. Del. Rule 31; E.D. Wash. Rule 9; D. Wyo. Rule 7; C.D. Calif. Rule 3.15; N.D. Fla. Rule 8. The courts adjacent to the D.C. District Court now have rules requiring such consultation. See D. Md. Rule 34; E.D. Va. Rule 11-1(J). Furthermore, the D.C. Superior Court recently adopted amendments to Rule 37(a) which require consultation prior to filing a motion to compel. The Committee believes that a local rule to this effect in the D.C. District Court is appropriate.

The proposed rule was drafted to meet the requirement of consultation on "all matters relating to discovery." Thus, consultation is required not only for motions to compel under Fed. R. Civ. P. Rule 37, but also for motions for enlargement of time to respond to discovery under Fed. R. Civ. P. Rule 6; for motions for a protective order under Fed. R. Civ. P. Rule 26(c); for motions to take a deposition prior to the 30-day waiting period under Fed. R. Civ. P. Rule 30, and for all other discovery matters for which a court order is necessary. Because discovery should be as cooperative a venture as possible, the Committee believes such consultation is appropriate for all discovery matters.

The proposed rule also requires consultation in good faith, but that consultation need not be oral or in a face-to-face meeting. A written letter may suffice if it meets the good faith standard. Furthermore, the certification need not be sworn but is to be included in the motion which is signed by the attorney filing the motion, or included in a separate signed statement filed with the motion.

The proposed revision does not represent a new practice in this District.*/ Many Federal judges in this District routinely require such consultation, and most attorneys now follow this procedure prior to filing motions for enlargements of time and motions to compel. This proposed rule imposes a requirement no greater than those in many similar jurisdictions. Therefore, the Committee feels it is necessary that the practice be formalized and expanded to all aspects of discovery motions practice.

II. RULE RELATING TO REPLY MEMORANDA

The Committee proposes that D.C. Local Rule 1-9 be further amended as follows:

Insert new Rule 1-9(e):

> (e) Reply Memorandum. If the moving party so desires, it may, within five (5) days after service of the opposing points and authorities, serve and file a reply memorandum.

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*/ The Committee decided not to adopt the specific language of D.C. Superior Court Rule 37(a) for two reasons. First, the Committee believed that the consultation requirement should apply to all discovery matters, and not just to motions to compel as required by the Superior Court. Second, the Committee believed the Superior Court requirement of a detailed recitation of the "specific facts describing the good faith effort" is an unnecessary requirement and adds little to the cooperation which the rules seek to foster.

Amend and renumber present Rule 1-9(e) as follows:

(f) Page Limitations. A statement of points and authorities in support of or in opposition to a motion shall not exceed 35 pages (double spaced), or 45 pages on letter sized paper, without prior approval of the Court. A reply memorandum filed pursuant to Rule 1-9(e) shall not exceed 15 pages (double spaced), or 18 pages on letter sized paper. Documents which fail to comply with this provision shall not be filed by the Clerk.

Renumber Rules 1-9(f)-(h) to Rules 1-9(g)-(i).

DISCUSSION:

At present, the Local Rules for the D.C. District Court have no provision for the filing of reply memoranda. The silence of the local rules suggests that parties who have filed a motion have no opportunity to respond to factual or legal arguments made in opposition briefs. As a result, litigants might reasonably assume that reply memoranda are not permitted by the court.

In fact, however, many of the judges of the District Court routinely permit the filing of reply briefs, and litigants who are acquainted with the "unwritten rules" of the court frequently file reply memoranda. Because there is no time limit for the filing of reply memoranda (since there is no rule at all), parties often wait more than ten days after the opposing memoranda has been filed, thus providing the moving party with more time to prepare a reply than was available to the opposing party to prepare an opposition memorandum. In addition, the moving party may file a reply on the eve of a hearing, thus prejudicing the opposing party's ability to respond to legal or factual arguments included in the reply brief. Moreover, there is no page limit restriction on

the length of reply briefs, even though the local rules impose such restrictions for memoranda in support of or in opposition to motions.*/

Because of this situation, the Committee urges the Court to adopt a local rule that will permit the filing of a reply memorandum within five days of receipt of an opposition memorandum. Adoption of such a rule would disclose the "unwritten" practices of the court to all practitioners. A new rule would provide the additional benefit of an established briefing schedule that does not permit surprise late filings of reply memoranda or the filing of excessively long reply memoranda. Also, the fact that the filing of reply memoranda is voluntary, and that a reply memorandum must be filed shortly after receipt of an opposition memorandum (five days) should discourage unnecessary filings.

As explained above, before the Committee decided to propose a new rule for the filing of reply briefs, it surveyed the local rules of all United States District Courts. Many jurisdictions have such a rule, including the following: C.D. Calif.; E.D. Calif.; N.D. Calif.; S.D. Calif.; D. Alaska; D. Arizona; S.D. Minn.; W.D. Mich.; N.D. Ill.; D. Nev.; E.D. Wash.; E.D. Wisc.; D.W. Va.; D.N.D.; E.D. N.C.; D. Ore.; M.D. Pa. The

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*/ The Local Rule relating to the page limitations, Rule 1-9(e), applies only to memoranda "in support of or in opposition to a motion...." The District Court Clerk's office takes the position that, since there is no specific provision in the rules, a reply brief theoretically could be filed in excess of the page limitation. A reply brief, however, in fact "supports" a motion and should be deemed to be governed by the existing limitation. In any event, even if the 35-page limit applied to reply briefs, the Committee believes such length is not necessary in a reply brief.

majority of those jurisdictions that have a local rule for reply briefs do not make it mandatory to file a reply brief, but they require that such briefs be filed within a few days of receipt of the opposing memorandum (ranging from two to fifteen days).

III. RULES RELATING TO ORAL TESTIMONY AT HEARINGS ON MOTIONS FOR A PRELIMINARY INJUNCTION

The Committee suggests that Rule 1-12 of the Local Rules be amended to renumber the existing rule as subsection (a) and add a new subsection (b) as follows:

> No oral testimony shall be heard on a motion for preliminary injunction unless the party proffering such testimony has notified the court and opposing parties of the identity of such witnesses at least two days prior to the date of hearing or, in exceptional circumstances and with the permission of the court, on such shorter notice as is feasible under the circumstances.

DISCUSSION:

The Project reviewed and discussed the procedures for seeking temporary restraining orders and preliminary injunctions, and found no other rules superior to current Local Rule 1-12. The members of the Project, however, felt that the Bar had some dissatisfaction with the procedure at hearings on motions for preliminary injunction, and the proposed rule addresses these concerns.

The general practice in this District Court is that motions for preliminary injunction are to be resolved on affidavits. This, of course, may be a proper practice, but on occasion one or more parties may wish to present oral testimony on factual

issues relating to the merits of the case, irreparable harm, etc. Experience showed that when such oral testimony is planned, the attorneys offering the testimony generally are not likely to disclose the names of the witnesses. Of course, since these motions generally are heard before discovery and pretrial, the presentation of such testimony may lead to substantial surprise and unfairness.

The Committee knows of no current consistent practice among the judges of the District Court regarding such oral testimony. Although advance notice is given occasionally, in most other instances the parties simply show up at the hearing with their witnesses and the judge generally allows the witnesses to testify. This is also the practice in some other jurisdictions, where the taking of testimony at a hearing on preliminary injunction is the norm rather than the exception. However, at least one court, the Eastern District of Louisiana, prohibits testimony altogether at any hearing on a motion unless there is prior approval of the court. See, E.D. La. Rule 3.14.

The Committee's proposed rule is a compromise between allowing unlimited testimony and prohibiting testimony altogether. Although it allows oral testimony, the notice provision eliminates the element of surprise and uncertainty which prevails in absence of a rule. Although not stated in the proposed rule, after a party has given notice of an intent to call witnesses, the court may require that oral testimony not be taken and that the evidence be submitted in some other manner, such as by affidavit.

CONCLUSION

The Committee believes that the above rule revisions would aid substantially all practitioners in the Federal District Court in the procedural areas affected. Overall, however, the Committee found the current local rules to be one of the best set of local rules among all the ninety (90) jurisdictions reviewed.

Committee on Court Rules