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 AMENDMENT TO THE LOCAL RULES OF THE THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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

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Committee on Court Rules

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*/ Principal author

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On January 4, 1994, the United States District Court for the District of Columbia published for comment a proposed change to Local Rule 107. 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 this proposal.

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, its Board of Governors, or any other Section of the Bar.

SUMMARY

Rule 107 presently incorporates the requirement in the Federal Rules of Civil Procedure that discovery materials be filed unless the court orders otherwise. This requirement is consistent with the presumption in the Federal Rules that discovery materials be available to the public unless the court enters a protective order under the "good cause" standard of Rule 26(c). The Section believes that any change

in the current requirement for filing discovery materials should preserve reasonable non-party access to these materials, particularly because a substantial number of civil cases in this Court involve issues of broad public interest, or are cases in which the federal or District of Columbia government is a party, or both.

The Section recognizes that unnecessary filing of discovery materials imposes significant burdens on the Court and on civil litigants in run-of-the-mill cases. The Section believes that the interest in avoiding those costs can be protected without undermining the public interest in access to discovery materials. The Section proposes an approach that strikes an appropriate balance between unnecessary filing and preservation of reasonable public access.

DISCUSSION

Under the Federal Rules of Civil Procedure, discovery materials are available to non-parties unless good cause for a protective order is established under Rule 26(c): "Rule 26(c)'s good cause requirement means that, '[a]s a general proposition, pretrial discovery must take place in public unless compelling reasons exist for denying the public access to the proceedings.'" *Public Citizen v. Liggett Group*, 858 F.2d 775, 789-90 (1st Cir. 1988) (citations omitted), *cert. denied*, 488 U.S. 1030 (1989).

This presumption of public access is also found in Rule 5(d) as well as Rule 26(c). In 1978, to minimize

storage costs for district courts, the Advisory Committee on Civil Rules proposed an amendment to Rule 5(d) providing that discovery materials not be filed except upon order of the court or for use in the proceeding. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 622-23 (1978). Notably, this proposed rule provided that discovery materials would continue to be treated as public records accessible by non-parties: "It is intended that the court may order filing on its own motion at the request of a person who is not a party who desires access to public records, subject to the provisions of Rule 26(c)." 77 F.R.D. at 623.

After receiving public comments, the Advisory Committee decided not to recommend this amendment to Rule 5(d). The Advisory Committee instead proposed, and Rule 5(d) was amended to require, that civil litigants file with the court all papers required to be served, "but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admissions, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding." Fed. R. Civ. P. 5(d). The Committee required filing of these discovery materials because these "materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the

public generally." Fed. R. Civ. P. 5(d), Advisory Committee Note, 85 F.R.D. 521, 525 (1980).

"The Advisory Committee notes make clear that Rule 5(d), far from being a housekeeping rule, embodies the Committee's concern that class action litigants and the general public be afforded access to discovery materials whenever possible." *In re Agent Orange Product Liability Litigation*, 821 F.2d 139, 146 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987). "Simply stated, the Federal Rules of Civil Procedure and the advisory committee notes indicate that discovery proceedings are presumptively open unless otherwise ordered by the court." *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010, 1015 (D.C. Cir.), *vacated on other grounds*, 737 F.2d 1170 (D.C. Cir. 1984) (*en banc*).

The provision authorizing courts to make exceptions to the general filing requirement was not intended to limit public access; rather, it reflected a concern that "the copies required for filing are an added expense and the large volume of discovery filings presents problems of storage in some districts." Advisory Committee Note, 85 F.R.D. at 525; *In re Consumers Power Co. Securities Litigation*, 109 F.R.D. 45, 50 (E.D. Mich. 1985) (purpose of exception in Rule 5(d) was to address storage problems, not to reduce non-party access); 4A C. Wright & A. Miller, *Federal Practice and Procedure*, § 1152, at 439 (1987).

As the Advisory Committee recognized, the requirement of public access to discovery materials embodied in the

Federal Rules serves important public policies. Discovery is a formal proceeding required by judicial rules and decisions, and parties are held accountable through motions to compel and motions for protective orders. The public therefore has a legitimate interest in access to discovery materials to learn about the working of the discovery process. Preventing access would choke off a vital source of data for empirical research about discovery and discovery abuse.

Furthermore, discovery materials provide information about the subject-matter of civil lawsuits, which "frequently involve issues crucial to the public." *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir.), *reh'g denied*, 717 F.2d 963 (1983), *cert. denied*, 465 U.S. 1100 (1984). "Civil litigation in general often exposes the need for governmental action or correction" because "in our present society many important social issues become entangled to some degree in civil litigation." *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *see Gannett Co. v. DePasquale*, 443 U.S. 368, 386-87 n.15 (1979) ("in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases").

In this Circuit, discovery materials have been consistently treated as records available to the public. For example, this Court has held that "ordinarily, a deposition is a public document 'freely open to inspection after it is

filed with the clerk,'" reflecting "the presumption inherent in Rule 26(c) . . . that the discovery should be open." *Avirgan v. Hull*, 118 F.R.D. 252, 255 (D.D.C. 1987) (citations omitted); *Tavoulareas v. Washington Post Co.*, 111 F.R.D. 653, 660 (D.D.C. 1986) ("The Federal Rules create a statutory presumption in favor of open discovery") (citations omitted). *See In re Halkin*, 598 F.2d 176, 188 (D.C. Cir. 1979) ("without a protective order materials obtained in discovery may be used by a party for any purpose, including dissemination to the public").

Local rules must of course be consistent with the Federal Rules of Civil Procedure. 28 U.S.C. § 2071; Fed. R. Civ. P. 83. A local rule that generally prohibits filing of discovery materials may not necessarily be inconsistent with the Federal Rules. *Hawley v. Hall*, 131 F.R.D. 578, 583 (D. Nev. 1990). However, any such rule must incorporate provisions maintaining reasonable public access to these materials.

Accordingly, the Section recommends that the Court include in any new rule safeguards that ensure that the public, including similarly situated litigants, will continue to have reasonable access to discovery materials. Non-parties should not be forced to rely on the discretion of the parties to share discovery materials not subject to a protective order. Unless otherwise required, parties have the right not to share discovery materials voluntarily with non-parties. *Public Citizen v. Liggett Group*, 858 F.2d at 780

(citations omitted). Accordingly, the rule should impose affirmative obligations on parties to make discovery materials available to non-parties.

If Rule 107 is changed along the lines of the proposal circulated for public comment, the Section recommends that it also require parties to file discovery materials at the request of any non-party unless disclosure is prohibited by a protective order. To reconcile a local rule comparable to proposed Rule 107 and the Federal Rules, the court adopted this approach in *Hawley v. Hall*, 131 F.R.D. at 583. At the time of the amendment of Rule 5(d), the then-Chairman of the Advisory Committee on Civil Rules, Judge Mansfield, wrote that "should the public importance of the material not appear until after filing has been excused, it is expected that the judge, upon motion of the press or other interested persons, would order the parties to file the documents for inspection." N.Y. Times, Aug. 2, 1980, at 20 col. 4 (letter to the editor) (quoted in *In re Agent Orange Product Liability Litigation*, 821 F.2d at 146).

Upon filing, discovery materials would become public records available from the Court on the same terms and conditions as they are under the current local rule. *See Hawley v. Hall*, 131 F.R.D. at 583 (citing rules making all filed documents public records). The local rule should provide that this obligation survives any final judgment terminating a civil action, whether entered through adjudication or through settlement. Accordingly, litigants should be

required to maintain these discovery materials for a specified period of time -- the Committee suggests three years as neither too long nor too short. This approach would maintain the status quo under the current Rule 107 in which non-parties have access through the Clerk's office to filed discovery materials after final judgments are entered, and if the proposed rule is adopted, access by non-parties should be as easy as it is now.

In addition, to ensure that non-parties can find out what discovery materials are available, parties should be required to file a certificate or notice that they have served discovery requests or responses. The Superior Court for the District of Columbia in its Rule 5(d), and the United States District Court for the District of Maryland in its Local Rule 6A, have adopted this approach.

A requirement that parties automatically file discovery materials at the request of non-parties is superior to an approach that requires non-parties to file a motion with the Court seeking an order requiring parties to file these materials. Because of the presumption in favor of public access, such a motion would normally be routinely granted, and mandating judicial involvement would simply impose unnecessary burdens on the Court. Parties may have a legitimate interest in protecting certain discovery materials from public disclosure, but the proper procedural vehicle to protect any such interest is through a protective order. Any party that objects to public access to discovery materials

should seek a protective order under the good cause standard of Rule 26(c), not an exemption from the filing requirement under unspecified standards.

The Section's proposed approach would also be superior to a provision that would make litigants custodians of discovery materials and require the litigants to provide copies to non-parties on request. For example, the rule could specify a period of time during which parties would be required to maintain these records after entry of final judgment, and require the producing (rather than the requesting) party to provide copies on request. A party that provides discovery materials to non-parties should be entitled to reasonable compensation on the same terms on which non-parties would obtain court records from the Clerk's office. The Section believes, however, that this alternative would be less desirable because private litigants, and small law firms and sole practitioners, may not be well equipped to serve as custodians of public documents.

The Section suggests that, in order to implement its recommended approach, the following language could be added to the proposed rule:

> Any party that produces discovery materials must maintain a copy for a period of three years after entry of a final judgment in the Court or final resolution of any appeals, whichever is later, and upon

> the request of any non-party made within such a three-year period, the producing party must promptly file requested discovery materials with the Clerk. A party that serves discovery materials on the opposing party shall file with the Clerk a "Certificate Regarding Discovery" that indicates the title of the discovery materials and the date of service.

Finally, to facilitate public access to discovery materials in cases of substantial public interest, the Court should establish a procedure to determine which cases fall into that category so that an order can be entered early in the case requiring filing of discovery materials. Under the Civil Justice Expense and Delay Reduction Plan that the Court adopted on November 30, 1993, counsel for the parties must participate in a meet-and-confer conference to discuss specified topics that will later be addressed in the order issued after the scheduling conference with the Court. This list of topics should include whether an order should be entered requiring the filing of discovery materials in that case.

Consistent with the comment to the proposed rule, the Section believes that filing of discovery materials should be unnecessary in the majority of cases. As a practical matter, most of the civil cases in this District are not

of interest to class members, similarly situated litigants, or the public generally. However, the Section believes that the additions it recommends to the proposed Rule 107 would not result in needless filing of discovery materials. The comment to the proposed rule states that under the current Rule 107, discovery materials are generally not filed in this Court, and this practice has not resulted in a significant number of motions by non-parties for filing or access. Moreover, because this Court has a significant number of cases of nationwide interest, and because civil cases in which the federal and District of Columbia governments are parties constitute a substantial percentage of all civil cases in this District, there is a special public interest in making sure that reasonable access to discovery materials is preserved.

Accordingly, the Committee recommends that proposed Rule 107 be amended to make clear that discovery materials remain public documents and that reasonable public access to these materials is preserved.