COMMENTS OF DIVISION 18 (LITIGATION) OF THE DISTRICT OF COLUMBIA BAR ON PROPOSED CHANGES TO THE LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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The views expressed herein represent only those of Division 18, Litigation, of the District of Columbia Bar and not those of the District of Columbia Bar or of its Board of Governors.

SUMMARY OF REPORT

The United States District Court for the District of Columbia has proposed numerous revisions to its local rules. The Litigation Division (Division 18) of the District of Columbia Bar seeks permission of the Court to submit limited comments on certain of the proposals contained therein.

The Litigation Division comments address only the Proposed Rules 104, 106(b) and 107. With respect to Proposed Rule 104, the Litigation Division supports continuation of the existing rule, with meaningful enforcement of its reciprocity provision, over imposition of the proposed rule, but strenuously opposes discarding of the proposed rule in favor of a non-reciprocity provision.

With respect to Proposed Rule 106(b), the Litigation Division respectfully suggests that absolute prohibition of correspondence with the Court--even where notice thereof is promptly delivered to the Court--is unnecessary. Proposed Rule 107, which presumes that discovery will be filed with the Court in the absence of an order of court to the contrary, is also opposed as unnecessarily expensive and burdensome. The division suggests a rule which permits any judge of the Court to require--in all cases or any given case--that discovery in cases assigned to them be filed routinely .

INTRODUCTION

The United States District Court for the District of Columbia has promulgated for comment proposed changes to its Local Rules. The Litigation Division (Division 18) of the District of Columbia Bar submits the ensuing comments on the proposed rule changes. This does not purport to be a comprehensive review of each proposed change or revision. The comments focus on what we believe are the major issues raised by the proposals and those of particular importance to litigators whose practice includes significant contact with the federal courts, here and elsewhere.

We have also limited the scope of our comments in recognition of the fact that they are being submitted late in the comment process, and we specifically seek permission of the Court to be heard on these limited issues "out of time." The comments address Proposed Rules 104, 106(b) and 107. As is clear from the comments themselves, they discuss the substance of the proposals in question as well as comments already submitted to the Court from other sources.

A. Proposed Rule 104

Proposed Rule 104, dealing with practice by attorneys before the Court, alters the existing rule by removing reciprocity as a consideration in determining whether members of the bar from contiguous areas may practice before the Court without local counsel. The existing rule provides that attorneys practicing in neighboring courts who are members of the bar of the United States District Court for the District of Columbia can practice before the latter Court without local counsel, so long as a reciprocal privilege is extended to members of the District of Columbia federal bar practicing before those courts.

We support the existing rule and its consideration of reciprocity. We do not believe that the proposed rule, precluding such consideration,

is necessary, and it may even have affirmative drawbacks. We are most concerned, however, with the suggestion of some commentators who object to the new rule that reciprocity should be abandoned as a consideration, and that a totally new rule should be enacted which simply permits those from contiguous jurisdictions to practice here without local counsel.

Reciprocity is, we believe, an important consideration in the practice of law today. While we feel that strict anticompetitive rules cannot be desirable in the District of Columbia any more than they are viewed favorably as they exist in surrounding jurisdictions, we believe it is no more desirable to encourage or ignore those kind of regulations in neighboring courts. Proposed Rule 104 appears to remove consideration of the restrictive requirements for local counsel in nearby courts. This, we fear, both encourages continuation of their restrictive rules and denigrates the standards and practice of our own Federal Court and the members of its bar.

The comment to Proposed Rule 104 indicates that the reciprocity provision has been deleted from the proposed rule because "it has been in effect for 15 years and no 'contiguous areas' have granted the reciprocity that would trigger its effect." Apparently, however, the United States District Court for the District of Maryland recently began to permit members of the District of Columbia Bar to appear and practice without local counsel where that court's trial certification requirement is met. Other commentators have also pointed out that this Court's Clerk's Office has ignored the reciprocity requirement, demonstrating that, even if there had been no change in the reciprocity granted in neighboring jurisdictions, it would most probably be attri-

butable to practice, not the old rule. We think that, before any change is made in the existing rule concerning practice before the Court, the existing reciprocity requirement should be given a chance to work. An amicable resolution to existing tensions between practice requirements of federal courts in the area may well result from actual enforcement of the provision which was doubtless designed to achieve that result.

We would suggest that the existing rule be clarified, to clearly grant privileges in this Court reciprocal to those granted in the other federal courts concerned. Thus, we suggest that it be made clear that where members of the District of Columbia Bar who are members of this Court can practice in federal court in Maryland or Virginia without local counsel, practitioners there who are members of the bar of the appropriate federal court can practice here. We also suggest that such "reciprocal" practitioners be granted the privilege to act as local counsel in this Court for attorneys from other locations only if a similar privilege is accorded to members of the bar of this Court. Our current local rule, for example, permits Maryland attorneys to practice here and to act as local counsel for out-of-town attorneys, while Local Rule 3 of the U. S. District Court for Maryland permits only practice as primary counsel, not local counsel, by members of this Court. We believe that this Court should grant privileges to nonresident counsel on an issue by issue basis.

In making these suggestions, however, we stress that practice under the existing, unamended rule is, in our view, preferable to abandonment of the reciprocity concept at this juncture.

B. Proposed Rule 106(b)

The Litigation Division cannot endorse the new proviso of Proposed Rule 106(b) prohibiting communication with the Court by letter. While improper use of correspondence cannot be condoned, the increasing complexity of litigation seems to include an increasing number of occasions when simple administrative matters are appropriately, and less expensively, brought to the Court's attention through letters copied to all parties.

Like most aspects of litigation and trial practice, this procedure can be abused by the ill-motivated. Where the Court is given assurance that the parties have been notified of the fact and substance of this kind of communication, however, we believe that it is preferable to rely on counsel to note, address and make a record of any attempted improprieties than to burden the majority of well-meaning counsel with an absolute prohibition. Counsel cannot help but be aware that abuse of this privilege will lead to its withdrawal in any case where abuse occurs.

Other commentators have applauded the new prohibition while questioning whether a need exists to prohibit oral communications between counsel and Chambers. We think that the existence of an ability to send correspondence rather than resort to formal, expensive motions encourages that form of communication, and the resulting written record and notice to other counsel, rather than use of oral alternatives.

In the belief that the vast majority of counsel are well-motivated and conscientious, and in the spirit of maintaining flexibility for that majority, we support only that portion of Proposed Rule 106(b) which prohibits leaving with or mailing to a judge papers for filing.

C. Proposed Rule 107

Proposed Rule 107 appears on its face to require filing of discovery material with the Court, and the comments to the rule proposal expressly admit that presumption, in the absence of contrary direction from the Court. The Litigation Division believes that this presumption is contrary to the prevailing trend, unnecessarily burdens the financial and other resources of the Court, and is not justified in order to meet the articulated reasons for the rule.

Discovery necessarily, pursuant to Rule 26 of the Federal Rules of Civil Procedure, encompasses much more than those matters which would be admissible at trial. Accordingly, it can be presumed that much of the discovery in the average case will not be admissible at trial of the issues in the case. While some judges appear to want access to discovery as a management tool in the litigation before them, it is questionable whether the presumption should be in favor of filing, given the expense involved for the Court.

The majority of federal courts have local rules that limit filing of discovery to those instances where it is required by the judge or necessary to the consideration of a motion or other issue. We do not believe that the number of judges on this Court who want discovery filed is so great as to mandate such filing in all cases. Surely, each judge who want such filing--in all cases or just a given matter--can order it. To burden the system of recordkeeping with unreviewed, frequently irrelevant material so that such situations will be automatically accomodated seems unjustified.

If this Court is concerned by the possibility that a high visibility case will engender the interest of media and others, it could by rule render all discovery material public and therefore distri-

butable by counsel. It can also address such interest on a case-by-case basis, without incurring the administrative expenses which flow from the current proposal. We note, with some concern, the increasing use of motions for protective orders which can only be increased by automatic filing or public scrutiny of discovery.

We believe that a rule allowing a judge to require, in particular civil cases or in all cases before that court, the filing of discovery materials of given kind or of all kinds would be preferable to the expenditure of scarce resources obviously involved in a presumption to the contrary. Accordingly, we suggest review of other alternatives to accomodating those judges who want discovery filed in their cases before putting in place the proposed rule.