Summary of Comments Of The Litigation Section of the District of Columbia Bar on the Proposed Amendments to Rules 26(c), 47(a), and 48 of the Federal Rules of Civil Procedure

Submitted March 1, 1996 to the Advisory Committee on Civil Rules, Committee on Rules of Practice and Procedure, United States Judicial Conference

The Litigation Section of the District of Columbia Bar respectfully submits these Comments on behalf of its more than 2,800 members for the Committee's consideration.

RULE 26(c).

We support the proposed amendments to Rule 26(c) regarding protective orders because they preserve the existing substantive law regarding public access to information produced in litigation, and they preserve the power of the courts to protect litigants from the abuses of liberal discovery. To ensure that actual practice is consistent with the Committee's intent, we suggest that the Committee Note be modified to confirm that the amendments only codify existing practice.

The proposed amendments to FRCP 26(c) divide the text into three subdivisions. The proposed amendment to subsection (1) permits entry of protective orders on stipulation, essentially codifying existing practice. This is in accord with the spirit of the FRCP, it facilitates an efficient discovery process, and it lightens the load imposed on the courts. If the need to keep information confidential is disputed, the Rule provides that the proponent of confidentiality has the burden of proof to show good cause, and the stipulation may be modified, upon motion, under subdivision (3).

Subdivision (3) is new, but it merely codifies the factors that should be considered by the courts in determining whether or not to modify or vacate a protective order. Nothing in the proposed amendments was intended to limit the courts' discretion to evaluate the competing interests when issuing or modifying a protective order. The prescribed factors in subdivision (3), while not all-inclusive, provide useful guidelines which focus on the litigant interests at stake, the point in the litigation when modification is sought, and the substantive law regarding public access. We support these guidelines as meaningful and fair provided that they are not interpreted to reach farther than the Committee intends.

RULES 47(a) AND 48.

The proposed amendment to FRCP 47(a) would require the court, while conducting voir dire, to permit counsel for the parties to participate in the questioning, within limits. The proposed amendment is intended to enhance the efficiency and fairness of the voir dire process. The proposed amendment to FRCP 48 would require initial selection of a jury from a 12 member panel. We support both the proposed amendment to FRCP 47(a) and to FRCP 48 to the extent that neither amendment is intended or permitted to interfere with or delay the efficient administration of the jury selection process.

LITIGATION SECTION OF THE DISTRICT OF COLUMBIA BAR

COMMENTS ON THE PROPOSED AMENDMENTS TO RULES 26(c), 47(a), AND 48 OF THE FEDERAL RULES OF CIVIL PROCEDURE AS PROPOSED BY THE ADVISORY COMMITTEE ON CIVIL RULES OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Daniel F. Attridge, Co-Chair
Nancy E. Lasater, Co-Chair
Diane S. Dorfman
Whitney M. Adams
Jaye (Janet M.) Letson
Susan K. Rudy
William A. Sarraille
David E. Sellinger

Steering Committee of the Litigation
Section of the District of Columbia Bar

Kathleen L. Blaner, Chair

Court Rules and Legislation Committee
Litigation Section of the
District of Columbia Bar

February 27, 1996

STANDARD DISCLAIMER AND DISCLOSURE

The views expressed herein represent only those of the Litigation Section of the District of Columbia Bar and not those of the D.C. Bar or its Board of Governors. The persons responsible for preparing these Comments are Daniel F. Attridge, Jaye (Janet M.) Letson, and Kathleen L. Blaner. Diane S. Dorfman and Susan K. Rudy abstained from any consideration of the proposed amendments and express no views as to the comments set forth herein.

COMMENTS ON THE PROPOSED AMENDMENTS TO RULES 26(c), 47(a), AND 48 OF THE FEDERAL RULES OF CIVIL PROCEDURE AS PROPOSED BY THE ADVISORY COMMITTEE ON CIVIL RULES OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States circulated for comment no later than March 1, 1996 the proposed amendments to Rule 26(c), 47(a), and 48 of the Federal Rules of Civil Procedure. The Litigation Section of the District of Columbia Bar respectfully submits these Comments for the Committee's consideration.

INTEREST OF THE LITIGATION SECTION

With over 2,800 members, the Litigation Section is by far the largest section of the District of Columbia Bar. Its members are actively involved in litigating civil cases in the federal courts and have a strong interest in the requirements of the Federal Rules of Civil Procedure.

COMMENTS ON PROPOSED AMENDMENT TO RULE 26(c)

We commend the Committee on Rules of Practice and Procedure ("Committee") for its diligence and restraint in drafting the proposed amendment to Federal Rule of Civil Procedure ("FRCP") 26(c), regarding protective orders, and its accompanying Committee Note. In our judgment, changes to the rule on protective orders are unnecessary. Nonetheless, we support the proposed amendments because they preserve the existing

substantive law regarding public access to information produced in litigation, and they preserve the power of the courts to protect litigants from the abuses of liberal discovery. Therefore, in order to ensure that actual practice is consistent with the Committee's intent, we suggest that the Committee Note be modified to confirm that the amendments seek only to codify existing practice.

The current rule and practice have served the ends of justice by providing protection to litigants compelled to produce confidential information in litigation, assets of inestimable value in today's information-intensive world. The importance of preserving this practice is paramount. There is no credible evidence that the recent outcry alleging a cloak of secrecy enveloping our courts, which initiated this review of FRCP 26(c) several years ago, was based on anything but hyperbole and the business interests of a few special interest groups. A study by the Federal Judicial Center, conducted at the urging of the same groups, found that protective orders were requested in only five to ten percent of civil cases (mostly civil rights cases), and that less than fifty percent of these requests were granted - clear evidence that the cloak of secrecy is quite transparent. Elizabeth C. Wiggins and Melissa J. Pecherski, *Protective Order Activity in Three Federal Judicial Districts: Interim Report to the Advisory Committee on Civil Rules*, Federal Judicial Center, October 14, 1994. Thus, the only empirical data available about the protective order issue proves that it is, in fact, a non-issue.

"Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984). The Supreme Court established that there is no "presumption of

public access" to information produced in pre-trial discovery. *Id.* at 33. The proposed amendment to FRCP 26(c) does not contradict this basic tenet of public access law. Indeed, the Committee Note expressly states that the amendment should not be understood to grant access to information that was not accessible before its enactment.

Protective orders were, and still are, a check against the abuses of "liberal discovery." Amendments to the protective order rule that would make it easier to obtain public access to confidential information produced in litigation would create unnecessary risks to the proprietary and privacy interests often embodied in information, whose content would remain confidential but for its court-compelled production. As one noted commentator put it, "Litigants do not give up their privacy rights simply because they have walked, voluntarily or involuntarily, through the courthouse door." Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts,* 105 Harv. L. Rev. 427, 466 (1991). In fact, it can be argued that when courts order litigants to produce information in which there is a proprietary or privacy interest, courts have an obligation under the Due Process Clause to protect those interests from injury or loss.

The proposed amendments to FRCP 26(c) confirm the courts' discretion to provide such protection. They divide the text into three subdivisions, with modifications to subsections (1) and (2) consisting primarily of style changes. In addition, subdivision (1) codifies the existing practice of entering protective orders on the stipulation of the parties. Subdivision (3) is new, but it merely codifies the factors that should be considered by the courts in determining whether or not to modify or vacate a protective order.

The proposed amendment to subsection (1) that permits entering protective orders on stipulation is a codification of the customary practice, in both federal and state courts. It is in accord with the spirit of the FRCP, it facilitates an efficient discovery process, and it lightens the load imposed on the courts. The stipulation provision does not eliminate the "good cause" requirement. As the Committee Notes recognize, if the need to keep information confidential is disputed, the proponent of confidentiality has the burden of proof to show good cause, and the stipulation may be modified, upon motion, under subdivision (3).

Notwithstanding the Committee's intent to do nothing more than codify existing practice, this proposed amendment has generated vociferous opposition from the media and other special interest groups, and already has been subject to misinterpretation. *See, e.g.*, Vladeck and Hitchcock, *Limiting Access to Court Records May Harm Public Interest*, L.A Daily J., March 14, 1995 (purportedly technical amendment marks an important shift in the law allowing parties to litigate cases in secrecy). To quote Professor Miller again, "[t]hey claimed the draft rule would undercut Rule 26(c)'s requirement that "good cause" must exist before a court enters a protective order. They are plainly wrong about that . . . ." Arthur R. Miller, *Protective Order Practice: No Need to Amend FRCP 26(c)*, 23 Prod. S. & Liab. Rptr. 438-39 (April 21, 1995). We commend the Committee for standing firm on this revision, despite the highly vocal opposition urging its deletion. If litigants could not stipulate among themselves to protective orders to expedite civil discovery, and instead, courts were required to review each document for which confidentiality was requested to determine whether good cause existed, courts would have little time to consider cases on the merits. The discovery process must be self-executing to the greatest extent possible in order to

preserve limited judicial resources. By codifying the practice, the proposed amendments help ensure that courts can devote their time to resolving cases on the merits.

The revisions to subdivision (3) also do nothing more than codify existing practice. The revisions do not expand the scope of information to which a right of public access exists, nor the scope of who may be authorized to intervene in order to modify or dissolve a protective order. Indeed, it would be beyond the Committee's authority under the Rules Enabling Act to change either of these factors, for rights of public access and standing are matters of substantive law. As the Committee Notes observe: "These provisions are supported by the practice that has developed through a long line of decisions."

It appears that nothing in the proposed amendments was intended to limit the courts' discretion to evaluate the competing interests when issuing or modifying a protective order. The prescribed factors in subdivision (3), while not all-inclusive, attempt to provide useful guidelines. The Committee Notes observe that: "The power to modify or dissolve should be exercised after careful consideration of the conflicting policies that shape protective orders."

Whether a protective order should be modified depends upon the litigant interests at stake, the point in the litigation when modification is sought, and the substantive law regarding public access. The law traditionally has limited public access to those documents that are used at trial, at hearings in open court, and in support of dispositive motions. *See In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1332-36 (D.C. Cir. 1985) (Scalia, J.). Documents produced in discovery, but not filed in court, have never been considered a source of public information, and, as the Committee Note states,

nothing in the proposed amendments should be interpreted to indicate a different result. Moreover, requests for access from litigants in other litigation against an identical party should be treated differently from requests for access from non-litigants, who rarely, if ever, will have interests in the confidential information that should be found to outweigh the litigant's interests.

Further, the traditional view has been that courts lack jurisdiction to modify a protective order after the parties have voluntarily dismissed a case and incorporated the terms of the protective order in the settlement agreement since "[a]ny case or controversy previously existing between the parties is moot after complete settlement." *Poliquin v. Garden Way*, 989 F.2d 527, 536-537 (1st Cir. 1993)(Keeton, J., dissenting). In recent years some courts have permitted modification of protective orders post settlement, yet even those courts have recognized that the constrained scope of the courts' power may permit modification, but it does not permit the court to order reproduction of documents already returned to the original owner. *See United Nuclear Corp. v. Cranford Insurance Co.*, 905 F.2d 1424 (9th Cir. 1990). The Supreme Court recently held that in the absence of the incorporation of a voluntary settlement agreement into a dismissal order under FRCP 41, a federal court has no jurisdiction over disputes arising out of the settlement agreement. *Kokkonen v. Guardian Life Ins. Co. of America,* 114 S.Ct. 1673 (1994). Consequently, interpreting the modification power of the courts after settlement too broadly would raise serious jurisdictional issues.

Despite the Committee's clear intent to do no more than codify existing law, already some overreaching interpretations of the proposed amendment to FRCP 26(c) have been advanced. See, e.g., Greenway, *Judicial Panel Seeks to Ease Sealing of Civil Suit*

Records, N.Y Times, March 10, 1995, at 1, col. 1 (the proposed amendment expands the role of those who are not parties to come before the courts). Equally dubious interpretations are likely to surface in the future. The mission of the courts is to provide an impartial forum for the resolution of legal disputes, not to serve as information clearinghouses. Therefore, we suggest that some additional language be added to the Committee note to clarify that the purpose of the amendments was to codify existing law, not to create new rights of access.

COMMENTS ON AMENDMENTS TO RULES 47(a) AND 48

The proposed amendment to FRCP 47(a) would require the court, while conducting voir dire, to permit counsel for the parties to participate in the questioning, within limits. The proposed amendment is intended to enhance the efficiency and fairness of the voir dire process. The proposed amendment to FRCP 48 would require initial selection of a jury from a 12 member panel. We support both the proposed amendment to FRCP 47(a) and to FRCP 48 to the extent that neither amendment is intended or permitted to interfere with or delay the efficient administration of the jury selection process.

The proposed amendments to FRCP 47(a) and 48 should help improve the diversity and objectivity of federal juries, and the efficiency of the jury selection process, thereby increasing the quality of justice. For example, allowing counsel to participate in voir dire, pursuant to the amendment to FRCP 47(a), should decrease reliance on peremptory challenges because participation gives counsel enhanced opportunities to garner information to support challenges for cause. A decline in the use of peremptory challenges will help reduce the likelihood that impermissible discrimination will play a role in shaping jury composition.

The proposed amendment to FRCP 48 would require initial selection of a 12 member jury panel. This is a step closer to the centuries old definition of a civil jury, which was amended in 1991 to conform to prevalent local court rules. Requiring the initial empaneling of 12 jurors, as proposed in the amendment to FRCP 48, should foster improved diversity among jury members, resulting in a jury that is more representative of the community, even if some members are ultimately excluded under FRCP 47(c).