Summary of Proposed Comments of the Litigation Section to the Advisory Committee on Local Rules of the United States District Court for the District of Columbia

The Litigation Section intends to submit comments to the Advisory Committee on Local Rules of the U.S. District Court for the District of Columbia regarding the proposed amendment of Local Rule 107.

The District Court proposes to amend Local Rule 107 so that discovery materials -- *i.e.*, interrogatories, depositions, requests for documents, requests for admission, and answers and responses thereto -- will no longer be filed with the Clerk unless the Court orders otherwise in a particular case. The Litigation Section supports the District Court's proposed amendment.

The Section on Courts, Lawyers and the Administration of Justice previously submitted comments to the Advisory Committee on Local Rules. The Courts Lawyers Section supported the District Court's proposed amendment of Local Rule 107 provided that further amendments were made. In particular, the Courts Lawyers Section proposed amendments that would impose a duty on parties (1) to retain discovery materials, regardless of whether they were ever filed or used in a case, for a period of three years after the case is concluded, and (2) to make copies of unfiled discovery materials available for non-parties upon demand, without any showing of need or interest, regardless of the burdens imposed, and notwithstanding the parties' need to keep the materials confidential.

The Litigation Section respectfully opposes the further amendments to Local Rule 107 proposed by the Courts Lawyers Section. In the view of the Litigation Section, the Court Lawyers Section's proposal is inconsistent with prevailing case law on non-parties' obtaining access to unfiled discovery materials, overstates the limited right of public access to discovery, would improperly eliminate the procedural requirements traditionally used to determine whether access should be permitted, would interfere with the rights of the parties to enter into agreements about unfiled discovery materials incident to settlement, and would be burdensome for the litigants and the Court system.

Accordingly, the Litigation Section urges that the District Court's proposed amendment to Local Rule 107 be adopted without further amendment.

LITIGATION SECTION OF THE DISTRICT OF COLUMBIA BAR

COMMENTS ON PROPOSED AMENDMENTS TO LOCAL RULE 107 OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AS PROPOSED BY THE SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR

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May 27, 1994

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 and Kathleen L. Blaner. Diane S. Dorfman abstained from taking any view on these Comments.

COMMENTS ON PROPOSED AMENDMENTS TO LOCAL RULE 107 OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AS PROPOSED BY THE SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR

The United States District Court for the District of Columbia published for comment a proposed change to Local Rule 107 on January 4, 1994. The Litigation Section of the District of Columbia Bar respectfully submits these Comments to the Advisory Committee on Local Rules for the U.S. District Court.

INTEREST OF THE LITIGATION SECTION

With over 2,600 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 U.S. District Court of the District of Columbia ("District Court") and have a strong interest in the requirements of the Local Rules.

PROPOSED AMENDMENTS TO LOCAL RULE 107

1. The Amendment Proposed By The District Court.

The amendment to Rule 107 put forth by the District Court would provide that interrogatories, depositions, requests for documents, requests for admissions, and answers and responses thereto shall not be filed with the Clerk of the Court except by order of the Court. It designates the party responsible for serving these discovery materials as their custodian, and requires that party to retain the originals and make them available for inspection by any other party upon request. The amendment gives the Court discretion to order that discovery materials be filed with the Clerk. *See* "Notice of Proposed Local Rule Changes and Opportunity to Comment," 122 *The Daily Washington Law Reporter* 8 (Jan. 4, 1994). Because the proposed amendment makes no change to the Court's document retention policy, the Court would retain copies of all discovery materials ordered to be filed, and of the materials submitted to the Court in hearings, in support of rulings on motions, and at trial. These Court-filed documents would be accessible to the public unless subject to a protective order.

2. The Further Amendments Proposed By The Courts, Lawyers And The Administration of Justice Section.

The Section on Courts, Lawyers and the Administration of Justice ("Courts Lawyers Section") of the D.C. Bar submitted comments on the District Court's proposed amendment to Local Rule 107 on or about February 18, 1994. Those comments offer qualified support for the proposed amendment provided that several further amendments are made. Courts

Lawyers Section Comments at 1-2. In particular, the Courts Lawyers Section proposes amendments that would impose a duty on parties (1) to retain discovery materials, regardless of whether they were ever filed or used in a case, for a period of three years after the case is concluded, and (2) to make copies of unfiled discovery materials available for non-parties upon demand, without any showing of need or interest, and regardless of the burdens imposed or confidentiality problems involved (unless the parties had previously obtained a protective order). *Id.* at 7-8.

COMMENTS OF THE LITIGATION SECTION

1. The Amendment Proposed By The District Court.

The Litigation Section supports the proposed amendment of the District Court to Local Rule 107, which would eliminate the filing requirement for discovery materials except upon order of the Court. Presently, Local Rule 107 parallels Federal Rule of Civil Procedure 5(d), which requires the filing of certain discovery materials, such as depositions, interrogatories, requests for documents, requests for admission, and answers and responses thereto. Currently, the Judges of the District Court waive these filing requirements in most cases, invoking the waiver authority contained in Federal Rule 5(d) and Local Rule 107. Therefore, the District Court's proposed amendment will make Local Rule 107 reflect actual practice. Moreover, it will relieve the Court of the ever-growing demand and increasing costs for storage space.

2. The Further Amendments Proposed By The Courts Lawyers Section.

The Litigation Section respectfully opposes the Courts Lawyers Section's proposal for further amendments to Local Rule 107. As discussed below, the proposal is inconsistent with case law on non-parties' obtaining access to unfiled discovery materials, overstates the limited right of public access to discovery, would eliminate the procedural requirements traditionally used to determine whether access should be permitted, would potentially interfere with the rights of the parties to enter into agreements about unfiled discovery materials incident to settlement, and would be burdensome for the litigants and the Court system.

A. The Courts Lawyers Section's proposal is inconsistent with case law on non-parties' obtaining access to unfiled discovery materials.

The Courts Lawyers Section relies on *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), for the proposition that there is a presumed right of "public access" to "discovery materials." Courts Lawyers Section Comments at 2. From that premise, the Courts Lawyers Section proposes that members of the public should have the right, on request, to require litigants to file previously unfiled discovery materials with

the Court, and that this right should extend for three years after the litigation is final. *Id.* at 9-10. However, *Public Citizen* and most other decisions do not support those sorts of proposals.[1]

Initially, the First Circuit held in *Public Citizen* that discovery materials not filed with the Court are not subject to a right of public access. "Certainly the public has no right to demand access to discovery materials which are solely in the hands of private party litigants." *Public Citizen*, 858 F.2d at 780; *see In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987) (no right of access to "information collected through discovery which is not a matter of public record"); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 11-13 (1st Cir. 1986) (no constitutional or common law right of access to unfiled discovery materials).

The First Circuit in *Public Citizen* also rejected the notion that parties could be required to file previously unfiled discovery materials after the case is concluded. It ruled that "although the district court had the power under Rule 5(d) to order filing of discovery materials during the pendency of the action, we hold that the court's power did not extend to postjudgment action" because it lacked jurisdiction, and thus could not impose new, affirmative discovery requirements on the litigants. *Public Citizen*, 858 F.2d at 781; *see United Nuclear v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990) (Court lacks jurisdiction to impose affirmative discovery requirements in concluded case); *Littlejohn v. BIC Corp.*, 851 F.2d 673, 683 (3d Cir. 1988) (absent fraud or extraordinary circumstances, trial materials returned to litigant at final termination of litigation are no longer judicial records within the supervisory power of the Court).

Finally, the First Circuit ruled that parties cannot be forced to preserve discovery materials after a case is over. *Public Citizen*, 858 F.2d at 781 ("once a case has been dismissed and rights to appeal have lapsed, parties are under no obligation, legal or practical, even to preserve discovery materials they have obtained"; parties are "free to destroy" unfiled discovery materials after the case is concluded).

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[1] One case that partially supports the Courts Lawyers Section's proposal is *Hawley v. Hall*, 131 F.R.D. 578 (D. Nev. 1990), where Magistrate Johnston announced that his "lenient policy" would be to require the filing of previously unfiled discovery materials upon the request of a non-party. *Id.* at 583. Such a policy, however, rests on the Court's authority in Federal Rule 5(d) and Nevada Local Rule 190-1(g) to require the filing of previously unfiled discovery materials on its own motion, not on any right of a non-party to obtain access automatically to unfiled discovery materials.

B. Public access rights to discovery are not as extensive as the Courts Lawyers Section's proposal suggests.

The Courts Lawyers Section's proposal assumes that there is a broad right of public access to discovery-related materials, whether filed or not. The case law, however, is not so expansive.

The right of public access to information produced in litigation traditionally has been limited to "the confines of the courtroom and court documents." Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts,* 105 Harv. L. Rev. 427, 429 (1991) (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-99 (1978)); *In re Reporters Comm. for Freedom of the Press*, 733 F.2d 1325, 1338-39 (D.C. Cir. 1985) (Scalia, J.) (analyzing historical development of public access rights); *Littlejohn*, 851 F.2d at 677-78 (quoting *Publicker Indus., Inc. v. Cohen*, 773 F.2d 1059, 1066 (3d Cir. 1984) (right of access to judicial proceedings and judicial records)); *In re Alexander Grant & Co. Litig.*, 820 F.2d at 355 (private documents collected during discovery are not judicial records).

Court documents are those that are filed with the Court. *Pansy v. Borough of Stroudsburg*, No. 93-7396, 1994 WL 158777, at *8 (3d Cir. May 2, 1994). Thus, unfiled discovery materials are not subject to a right of public access. *Public Citizen*, 858 F.2d at 780; *see In re Alexander Grant & Co. Litig.*, 820 F.2d at 355.

Moreover, it is well settled that discovery is not a public component of a civil trial, nor has it ever been. As the Supreme Court of the United States has ruled:

> pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law. . . . Discovery rarely takes place in public. Depositions are scheduled at times and places most convenient to those involved. Interrogatories are answered in private.

Seattle Times Co. v. Rhinehart, 467 U.S. 20, 23 & n.19(1984); *see* Richard Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 13-14 & nn. 61-62 (1983).

C. The Courts Lawyers Section's proposal would dispense with the procedural requirements that Courts have traditionally used to determine whether a non-party may have access to unfiled discovery materials.

Although unfiled discovery materials are not subject to a right of public access, there are circumstances under which a member of the public may obtain access to those materials *after* the non-party makes a proper showing that access should be permitted. The Courts Lawyers Section's proposal would eliminate the established procedural requirements for making this

showing and instead make access to unfiled discovery materials available to non-parties on request.

Before obtaining access to unfiled discovery materials, a non-party generally must meet certain requirements. The non-party must show that it meets the standards for intervention in the litigation. *See, e.g.*, *Pansy*, 1994 WL 158777, at *3-4; *Public Citizen*, 858 F.2d at 783-84; *Anderson*, 805 F.2d at 4. The non-party must show that the Court has jurisdiction to grant the access requested. *See, e.g.*, *United Nuclear*, 905 F.2d at 1428; *Public Citizen*, 858 F.2d at 781; *Littlejohn,* 851 F.2d at 683. Finally, the non-party must overcome any showing made by the parties for the non-disclosure of, or restricting access to, the unfiled discovery materials. *See, e.g., Pansy*, 1994 WL 158777, at *10-18; *Publicker Indus.*, 733 F.2d at 1071.

As a basis for excusing a non-party from meeting those criteria before requiring parties to file previously unfiled discovery materials, the Courts Lawyers Section contends that non-parties would "routinely" win on these points and that forcing the Court to resolve such issues would "impose unnecessary burdens on the Court." Courts Lawyers Section Comments at 8. However, no cases or other authorities are cited in support of this argument.

Under prevailing law, it is the Court that decides whether public access is appropriate -- not the public or the media, as proposed by the Courts Lawyers Section. The District Court's proposed amendment is consistent with prevailing law, and preserves the important role of the Court in determining whether public access should be granted or denied to unfiled discovery materials. That discretionary authority should remain with the District Court, and not be transferred to non-parties.

D. The Courts Lawyers Section's proposal would potentially interfere with the rights of parties to enter into agreements about unfiled discovery materials incident to settlement.

Under Federal Rule of Civil Procedure 41(a)(1)(ii), a voluntary dismissal by stipulation is of right and cannot be conditioned by the Court. *Smith v. Phillips*, 881 F.2d 902, 904 (10th Cir. 1989). Thus, parties to litigation generally have a right to settle their lawsuit without aid of the Court, and to make one term of settlement an agreement that unfiled discovery materials shall be kept confidential or destroyed. *See Public Citizen*, 858 F.2d at 780.

The Courts Lawyers Section's proposal would potentially interfere with the litigants' settlement rights in two respects. First, the proposal would prevent the parties from effectively assuring the confidentiality of unfiled discovery materials pursuant to a settlement agreement. Under the proposal, every confidentiality agreement incident to settlement would be conditional only and unfiled discovery materials would be potentially subject to public access for three years after the settlement takes effect.

Second, the proposal would prevent the parties from agreeing to the destruction of unfiled discovery materials. Instead of being "free to destroy" unfiled discovery materials at the conclusion of the litigation, *Public Citizen*, 858 F.2d at 781, the proposal apparently would obligate the parties to hold on to the materials for three years, while risking their disclosure to the public.

The proposal also raises jurisdictional issues relating to the Court's ability to modify or set aside a settlement agreement in a case that has been dismissed. The Supreme Court very recently held that the federal courts lack jurisdiction over disputes arising out of an settlement agreement that results in a stipulation of dismissal. *Kokkonen v. Guardian Life Ins. Co. of America*, No. 93-263, 1994 WL 183616 (U.S. May 16, 1994).

E. The Courts Lawyers Section's proposal would generate added burdens for the Court and litigants.

The Courts Lawyers Section's proposal would also impose unprecedented new obligations on both the parties and the Court, as the following examples demonstrate:

- Discovery would become more complicated and costly. Parties would have to take extra steps to limit or restrict access to confidential information or documents, which, although confidential and unfiled, might later be the subject of a public request for access.

- Parties often destroy discovery materials once litigation is final. Under the Courts Lawyers Section's proposal, parties would likely need a Court order to do so, which could likely be obtained only after briefing and hearings.

- Storage costs for litigants would increase during the three-year post-litigation period. The costs would be felt most keenly by private and small business litigants.

- Unknowing violation of the three-year retention requirement by unsophisticated litigants is possible and would raise more issues to be resolved.

CONCLUSION

The amendments proposed by the Courts Lawyers Section to Rule 107 should be rejected because of its inconsistencies with present law and practice, and the practical problems it would create for the litigants and the Court. The District Court's amendment, however, is in harmony with existing law and practice, and will serve the public's interest in litigation. Consequently, the District Court's proposed amendment to Local Rule 107 should be adopted without further amendment.