

Changes to Federal Rules of civil Procedure and Federal Rules of Evidence

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(Submitted on behalf of Commercial Litigation CLE Committee)

Introduction

On December 1, 2000 several revisions to both the Federal Rules of Civil Procedure and the Federal Rules of Evidence came into effect. The Civil Rules Amendments were a culmination of four years study and review by the Discovery Subcommittee of the Judicial Conference Advisory Committee on Civil Rules; review and request for comments by the Judicial Conference Committee on Rules of Practice and Procedure, which then made some minor revisions; and submitted the proposed Amendments to the Supreme Court of the United States¹, which, in turn, submitted the same², without any changes, under the Rules Enabling Act to the Congress, which likewise, made no changes.³ The Rules of Evidence Amendments came after more than two years of review, debate and comment and they were likewise transmitted by the United States Supreme Court to the Congress on the same date without change.⁴

Coming so soon after the 1993 revisions to the Federal Rules of Civil Procedure, and the near contemporaneously enacted Judicial Improvements Act of 1990⁵, as well as the trilogy of United States Supreme Court decisions pertaining to expert testimony⁶, the 2000 Amendments attempt to bring order to both the mandatory disclosure requirements of the Federal Rules of Civil Procedure and the gate-keeping role of the District Judges with respect to expert witnesses.

New Federal Rules of Civil Procedure

The recent amendment to Rule 26 of the Federal Rules of Civil Procedure now mandates all District Court to generally require narrower initial mandatory disclosure at the beginning of the case, except in eight proscribed categories of cases,⁷ or unless the Court enters a specific order with respect to an individual case, relieving the parties from disclosing, or the Parties stipulate to forego disclosure.⁸ Federal Districts may no longer opt out of implementation of some or all of the Federal Rules of Civil Procedure disclosure requirements, as they previously could.⁹ However, it should be noted that the scope of disclosure has generally been narrowed from the broader *Arelevant to disputed facts alleged with particularity in the pleadings*¹⁰ to the now narrower, *Amay use to support its claims or defenses, unless solely for impeachment*¹⁰ The Committee notes **indicate that there is no obligation to disclose, if the Party does not intend to use specific materials or a specific witness, whether favorable or unfavorable.**¹¹ Not only does this more narrow definition of the scope of discovery now apply to mandatory disclosure, it also is the standard for scope of discovery in general, as indicated in Rule 26 (b) (1) *ADiscovery Scope and Limits.*¹²

Neither side may take more than 10 depositions,¹² and the depositions cannot last more than one day of 7 hours, absent the entry of a court order or stipulation of the parties.¹³ Sanctions, including reasonable costs and attorney-s fees may be imposed upon the *Aperson responsible*¹⁴ for frustration of the *Afair examination of the deponent.*¹⁴

Of course, there is no change to Rule 26 (a) (2), *ADisclosure of Expert Testimony,*¹⁵ and unless otherwise ordered by the Court, expert disclosure shall take place¹⁵ 90 days before the trial date or the date the case is to be ready for trial.¹⁵

New Federal Rules of Evidence

Rule 702, Federal Rules of Evidence, now states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.¹⁶

The Committee Notes explain that the change to Rule 702 was initially in response to Daubert¹⁷ and that the Supreme Court granted certiorari in Kumho Tire¹⁸ before the Standing Committee released the rule for public comment. The Committee Notes go on to state:

The Committee unanimously found that the Court's Analysis in Kumho was completely consistent with, and supportive of, the approach taken by the proposed amendment. The Court in Kumho held that the gatekeeper function applies to all expert testimony; that the specific Daubert factors might apply to non-scientific expert testimony; and that the Rule 702 reliability standard must be applied flexibly, depending on the field of expertise. The proposed amendment precisely tracks Kumho in all these respects....

The Committee unanimously agreed that the Amendment would perform a great service even after the Court's resolution in Kumho. Even after Kumho, there are many unresolved questions about the meaning of Daubert, such as 1) the standard of proof to be employed by the trial in determining reliability; 2) whether the trial court must look at how the expert's methods are applied; and 3) the relationship between the expert's methods and the conclusions drawn by the expert. Moreover, even without any obvious conflicts on the specifics, the courts have divided more generally over how to approach a Daubert question. Some courts approach Daubert as a rigorous exercise requiring the trial court to scrutinize in detail the expert's basis, methods and applications. Other courts hold that Daubert requires only that the trial court assure itself that the expert's opinion is something more than unfounded speculation. The Evidence Rules Committee believes that the adoption of the proposed rule change, and the Committee Note, will help to provide uniformity in the approach to Daubert questions. The proposed amendment and the Committee Note clearly envision a more rigorous and structured approach than some courts are currently employing.¹⁹

Rule 703, Federal Rules of Evidence has also been amended and now reads:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to

be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.²⁰

Since the inception of the Federal Rules of Evidence in 1975, more aggressive attorneys would use, or at least attempt to use former Rule 703, as a conduit for rampant hearsay testimony, often by having an expert testify that others in his field agreed with his opinion or position, either because he had discussed the facts of the case and his conclusions or opinions with them, or because they had written articles or textbooks that supported his position.²¹ Again the Committee Notes highlight the previous problem and what is intended by the Amendment;

Under current law (i.e. the old Rule) litigants can too easily evade an exclusionary rule of evidence by having an expert rely on inadmissible evidence in forming an opinion. The inadmissible information is then disclosed to the jury in the guise of the expert's basis. (sic) The proposed amendment imposes no limit on an expert's opinion itself. The existing language of Evidence Rule 703, permitting an expert to rely on inadmissible information, if it is of the type reasonably relied upon by experts in the field, is retained. Rather, the limitation imposed by the proposed amendment relate to the disclosure of this inadmissible evidence to the jury. Under the proposed amendment, the otherwise inadmissible information cannot be disclosed to the jury unless its probative value in assisting the jury to evaluate the expert's opinion substantially outweighs the risk of prejudice resulting from the jury possible misuse of the evidence.²²

This rule does not prohibit the *opponent*, as opposed to the *proponent* of the expert's opinion from delving into the basis of said expert's opinion, and even introducing such basis or underlying facts, if it is used for impeachment purposes, to show that there is weak support for said opinion. Such move on cross examination, may unwittingly open the door, so that the proponent may then also introduce the underlying facts or evidence.²³

An amendment to Rule 103, Federal Rules of Evidence will probably engender as much litigation as it is intended to prevent. It will certainly be a possible source of legal malpractice for the unwary trial attorney also.²⁴ The new language states:

A Once the court makes a *definitive ruling on the record* admitting or excluding evidence, either at or before trial, a party need not renew any objection or offer of proof to preserve a claim of error for appeal.²⁵ (Emphasis added.)

The Committee Notes emphasizes that the trial practitioner must clarify on the record whether a ruling is definitive or not, if that is otherwise unclear. It then goes on to state:

AEven where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision, when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling objections must be made when the evidence is offered to preserve the claim of error for appeal. The error, if any, in such a situation occurs only when the evidence is offered and admitted. (United States Aviation Underwriters, Inc. v. Olympia Wings, Inc. 896 F. 2d 949 956 (5th Cir., 1990)..

AA definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal, unless they have been brought to the attention of the trial court by way of a renewed , and timely, objection, offer of proof, or motion to strike.²⁶

Conclusion

Attorneys, judges and forensic experts are going to need to be aware of these many significant changes and the impact they will have on the way cases are prepared and tried and experts are used in the future. Presumably these changes will eventually trickle down and become part of various states= rules of civil procedure and rules of evidence, as previous changes have done.²⁷

ENDNOTES

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1. See generally, Tobias, A Congress and the 2000 Federal Civil Rules Amendments, 22 Cardozo L.Rev. 75 (2000) and the citations therein. The Preliminary Draft of the Proposed Amendments to the Federal Rules of Civil Procedure and Evidence and Request for Comments can be found beginning at 181 F.R.D. 18 (1998), along with the Report from Paul V. Niemeyer, Chair of the Advisory Committee on Civil Rules to Honorable Alicemarie H. Stotler, Chair, Committee on Rules, Practice and Procedure of the Judicial Conference of the United States, dated June 30, 1998, which can be found starting at 181 F.R.D. 24 and the Report from the Honorable Fern M. Smith, Chair Advisory Committee on Evidence rules to Honorable Alicemarie H. Stotler, Chair Committee on Rules, Practice and Procedure of the Judicial Conference of the United States, dated May 1, 1998 which can be found starting at 181 F.R.D. 109 (1998).
 2. For the transmittal from the Supreme Court of the United States to the Congress, see Letter from William H. Rehnquist, Chief justice of the United States Supreme Court to J. Dennis Hastert, Speaker of the House of Representatives (April 7, 2000) reprinted in H.R. Doc No. 106-228 at 1-2 (2000).
 3. See 28 U.S.C. 2074 (a) (1994) for the Rules Enabling Act.
 4. US Orders 2000-3 at p. 6.
 5. See generally, Stinson, A The Impact of Discovery Changes in Federal Courts on the Role of Expert Witnesses, 49 CPCU Journal 45 (Spring, 1996) and many articles cited therein.
 6. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993), General Electric Co. v. Joiner, 522 U.S. 136 (1997) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).
 7. Rule 26, Federal Rules of Civil Procedure, effective December 1, 2000. The exempted matters are: 1) an action for review of an administrative record, 2) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence, 3) an action brought without counsel by a person in custody of the United States, a state or a state subdivision, 4) an action by the United States to enforce or quash an administrative summons or subpoena, 5) an action by the United States to recover benefit payments, 6) an action by the United States to collect on a student loan guaranteed by the United States, 7) a proceeding ancillary to proceedings in other courts, 8) an action to enforce an arbitration award. Rule 26(a) (1) (e) (i-viii), Federal Rules of Civil Procedure.
 8. Rule 26(a) (1), Federal Rules of Civil Procedure. However, Districts cannot enter blanket Orders or Local Rules opting out of the requirements of Rule 26. See generally, Committee notes at US Orders 2000-2 at p.42.
 9. Old Rule 26, Federal Rules of Civil Procedure. See generally, Stienstra (Research Division, Federal Judicial Center) Implementation of Disclosure in United States District Courts With Specific Attention to Courts= Responses to Selected Amendments to Federal Rules of Civil Procedure 26" (March 24, 1995).

10. Compare old Rule 26 (a) (A) and (B), Federal Rules of Civil Procedure with new Rule 26 (a) (A) and (B), Federal Rules of Civil Procedure. See generally, Stinson, *The Impact*,[@] supra Note 4 and Tobias, supra Note 1. Tobias notes: *The apparent objectives of the federal rules revision entities in developing the amendment are to limit discovery and "fishing expeditions" by restricting parties to discovery matters raised in the pleadings...If modification in discovery were clearly needed now, the revision promulgated may not represent a significant advance and may in fact serve only to confuse and complicate the discovery process. The revision substituted a new standard, the "relevant to the claim or defense" standard for the long standing "subject matter" concept. Although, the "subject matter" concept has comparatively clear meaning and is a criterion with which judges, lawyers, and parties are familiar, the "relevant to the claim or defense" concept could well foster satellite litigation over its construction and over discovery's scope...For example, the "claim or defense" phraseology may require plaintiffs to draft relatively particularized pleadings before they have access to information under the control of defendants that would currently be available through discovery* [@]Tobias, supra, note 1 at pp. 82-83. Likewise, defense attorneys may need to be more creative in raising affirmative defenses and answering allegations, in order to obtain the discovery they need to obtain.

11. See generally, Committee notes at US Orders 2000-2 at p.42. This does not mean you **do not** have to answer Interrogatories that specifically seek certain information.

12. Rule 30 (a) (2) (A), Federal Rules of Civil Procedure states: *AA party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule (b) (2), if the person to be examined is confined in prison, or, if without the written stipulation of the parties, (A) a proposed deposition would result in more than ten depositions be taken under this rule or Rule 31, by the plaintiffs, or by the defendants, or by the third party defendants,*[@] (emphasis added).

13. Rule 30 (d) (2), Federal Rules of Civil Procedure states: *AUnless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26 (b) (2) if needed for a fair examination of the deponent or if the deponent and another person, or other circumstances, impedes or delays the examination.*[@]The Committee notes indicate that breaks for lunch and other reasons are not to be counted against the seven hours and that it is expected that reasonable accommodations will be worked out among the attorneys and deponent, so that it will not be necessary to continually run to the court for rulings. See generally, Committee notes at US Orders 2000-2 at p.52. It is again noted that District wide or Judge specific Orders may not be entered now, as they could after the 1993 Amendments limiting depositions; however the Parties may stipulate or the Judge may enter an Order for an individual case limiting or expanding depositions and deposition lengths. Id. at 53.

14. Rule 30 (d) (3), Federal Rules of Civil Procedure.

15. Rule 26 (a) (2), Federal Rules of Civil Procedure. See generally, Stinson, *The Impact...*, *supra*, Note 4.

16. Federal Rules of Evidence, Rule 702. Compare to former Rule 702, which states: *If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.* The following has simply been added to form the new version of Rule 702: *If (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*

17. *Daubert*, *supra*, Note 5.

18. *Kumho*, *supra* Note 5. For recent law review articles on the impact of the *Kumho* decision, see, Graham, *The Expert Witness Predicament: Determining 'Reliable' Under the Gatekeeping Test of Daubert, Kumho, and Proposed Amended Rule 702 of the Federal Rules of Evidence*, 54 *U. Miami L. Rev.* 317 (2000), Stilwell, *Kumho Tire: The Battle of the Experts Continues*, 19 *Rev. Litigation* 193 (2000).

19. US Orders 2000-3 at p. 10.

20. Rule 703, Federal Rules of Evidence. For an insightful article on the abuses that the amendment is intended to curb see, Carlson, *Is Revised Expert Witness Rule 703 A Critical Modernization for the New Century?* 52 *Fla. L. Rev.* 715 (2000)

21. Carlson, *supra*, Note 18.

22. US Orders 2000-3 at p. 11.

23. US Orders 2000-3 at p. 27. See generally, United States Army Legal Services Agency, *USALSA REPORT: Litigation Division Note: Changes to the Federal Rules of Civil Procedure and Federal Rules of Evidence*, 2001 *Army Law.* 37

24. See, Cuadras and Jones, *Recent Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*. 38 *Houston Law.* 10, 5-7 (Sept./Oct. 2000)

25. Rule 103 (a), Federal Rules of Evidence.

26. US Orders 2000-3 at p. 14.

27. See generally, Stinson, *The Impact...* *supra*, Note 4 at p. 45.