

DISCUSSION OF THE 2000 AMENDMENTS TO
THE FEDERAL RULES OF CIVIL PROCEDURE AND EVIDENCE

I. FEDERAL RULES OF CIVIL PROCEDURE

A. Introduction.

1. The effective date of the Federal Rules of Civil Procedure is December 1, 2000.
2. The two important themes of the new Rules are uniformity and increased participation by the judiciary in the discovery process.
3. Many anticipate that the changes will have a significant effect on discovery practice. The actual effects, however, are unclear because of the contemplated increased participation by the judiciary in resolution of disputes. The decisions made by particular judges, in the exercise of their discretion, in resolving these disputes will ultimately determine how significant the changes will be on discovery practice.
4. In addition to thoroughly reading the Rule changes it is advisable to carefully review the Advisory Committee Notes which take up problems not discussed in the Rules.

B. Fed. R. Civ. P. 5(d): Public Access to Discovery Materials.

1. Although seemingly innocuous, the new Rule makes important changes regarding the accessibility of third parties to discovery materials.
2. The Rule bars the filing of disclosure and discovery materials with the court "until they are used in the proceeding or the court orders filing"
3. Practice pointers: (a) important to distinguish between a confidentiality order and sealing by the court; (b) dispositive motions filed with discovery materials attached are presumptively available to the public; (c) the Rule may be more important in high-profile cases; (d) important to raise the proposed procedure for testing the scope of Rule 5(d) at the Rule 16 conference; (e) whether the material is "used" in court or a proceeding may depend on whether there has been "sufficient use."

C. Fed. R. Civ. P. 26 (a)(1): Mandatory Disclosure

1. This Rule change may be the most controversial.
2. Now all judicial districts must comply with the initial disclosure requirements, but those requirements are less rigorous under the new Rule.
3. The new Rule requires identification of all documents and witnesses that the disclosing party may use to support its claims and defenses unless used solely for impeachment. There is no longer a requirement of disclosure of harmful information.
4. Practice pointers: (a) the word "may" is not permissive; it means any possibility a party "might" use the material; (b) if there is overlap of mandatory disclosure requirements and impeachment material, DISCLOSE IT; (c) request judicial intervention in discovery disputes that go to the heart of the litigation; (d) "use" is defined broadly to include all proceedings including pretrial conferences, motions, and trials; (e) the parties may stipulate out of the mandatory disclosure requirements, and a party has the right to object to making mandatory disclosures during the Rule 26(f) conference.

D. Fed. R. Civ. P. 26 (f) Conference

A Rule 26(f) conference is still required but it need not be face-to-face. The new Rule takes account of geographical factors that can make a face-to-face conference undesirable.

E. Fed. R. Civ. P. 26(b)(1): Limits on Scope of Discovery

1. This Rule competes with Rule 26(a)(1) for the most controversial change in the Rules.
2. The Rule expressly limits the scope of discovery to non-privileged matters relevant to the claim and defense of a party. The broader scope of discovery based on the "subject matter" has been replaced. For good cause shown, however, the court may order discovery of information relevant to subject matter. The new Rule reflects a significant burden shift in the discovery process. The burden is no longer on the producing party to limit discovery, now it is on the requesting party to expand the scope of discovery.
3. Practice pointers: (a) pleadings for both the plaintiff and the defendant need to be framed with Rule 26(b)(1) in mind; (b) invoke the assistance of the court for discovery disputes – the Advisory Committee Note invites the courts to confine discovery to the claims and defenses asserted in the pleadings and the parties are signaled that they are not entitled to discovery

to develop new claims and defenses; (c) the good cause exception is designed for unusual circumstances; (d) if a party is seeking broad discovery he/she should focus on the broader definition of relevance in the Rule and argue that the material is reasonably likely to lead to the discovery of admissible evidence; (e) note that there may be a drafting error regarding the good cause exception because it allows for the court to order discovery of "any matter" without reference to privileged material; (f) consider the effect of removal proceedings on the original pleadings filed .

F. Fed. R. Civ. P 26(b)(2): Elimination of Opt-Out

The new Rule forecloses the use of a local rule regarding the number of depositions and interrogatories, though it allows a local rule to limit or expand the number of requests for admission.

G. Fed. R. Civ. P 37(c): Failure to Make Disclosure or Cooperate in Discovery; Sanctions

1. The new Rule creates a presumptive preclusion for evidence that has not been disclosed pursuant to Rule 26(a) or Rule 26(e)(1).
2. This may be the most important rule of evidence which is not contained in the rules of evidence.

II. FEDERAL RULES OF EVIDENCE

A. Rule 103: Motions in Limine.

1. The new Rule makes clear what is expected of attorneys who move in limine and wish to preserve the issue for appeal.
2. Practice pointers: (a) counsel are encouraged to file motions in limine to carefully define the evidentiary issues for trial; (b) counsel who wish to preserve the issue for appeal must insure that the record reflects a "definitive" ruling by the court.

B. Rule 701: Lay Opinion Testimony

1. The new Rule makes it clear that if a witness is offering expert testimony its admissibility is judged under Rule 702 not 701.
2. A problematic issue will be testimony from a witness based upon his/her "specialized knowledge."
3. The Advisory Committee Notes provide some guidance relying on the

analysis of a Tennessee state court. Lay witness testimony is defined as that which "results from a process of reasoning familiar in everyday life." In contrast, Rule 702 expert testimony is defined as that which "results from a process of reasoning which can be mastered only by specialists in the field."

4. Practice pointer: In Judge Silver's court, counsel are required to give notice to opposing counsel of proposed Rule 701 lay witness opinions.

C. Rule 702: Expert Opinion Testimony

1. The new Rule codifies Daubert and Kumho.
2. Practice pointers: (a) raise all Daubert issues well before trial, and in Judge Silver's court counsel are required to consider these issues at the Rule 26(f) conference; (b) reliability of the expert and his/her opinions is the critical issue; (c) carefully prepare the expert with an understanding that what you inform the expert during the colloquy with him/her might be discoverable; (d) consider whether pursuant to the *Erie* doctrine the Arizona (Logerquist v. McVey, 1 P.3d 113 (2000)) interpretation of Rule 702 must be applied in federal court in a diversity case.

D. Rule 703: Basis of the Expert's Opinions

1. The new Rule requires stricter scrutiny of hearsay and other incompetent information relied on by the expert to support his/her opinion.
2. Now, instead of allowing the evidence, Rule 703 bars its introduction unless the probative value outweighs the prejudicial effect.
3. Practice pointer: The amendment does not prevent cross-examination into the basis of the expert's opinion, but the cross will open the door to the proponent to explore the basis more fully which will present strategic challenges for both counsel.

E. Rules 803 & 902: Self - Authentication of Business Records

The new Rule now authorizes self authentication by affidavit or declaration and no longer demands that the custodian testify. The opponent of the authentication bears the burden of coming forward with evidence challenging the authenticity.