

## **PROPOSED RULE AMENDMENTS OF SIGNIFICANT INTEREST**

The following summarizes the considerations underlying the recommendations of the advisory rules committees and the Standing Rules Committee on topics that raised significant interest. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is sent with this report.

### **Federal Rules of Civil Procedure**

#### **I. Civil Rule 26**

##### **A. Brief Description**

The 1993 amendments to Civil Rule 26 have been interpreted to allow discovery of all draft expert witness reports and all communications between counsel and testifying expert witnesses. The experience under those amendments revealed significant practical problems. To address those problems, the proposed amendments to Civil Rule 26 extend work-product protection to draft reports by testifying expert witnesses and, with three important exceptions, to communications between testifying expert witnesses required to submit a report under Rule 26(a)(2)(B) and retaining counsel. The amendments also clarify the report requirement for a witness who is designated as a testifying expert but who is not required to provide a Rule 26(a)(2)(B) report because the witness is not retained or specially employed to provide expert testimony and is not an employee who regularly gives expert testimony. The amendments make clear that while such a witness need not prepare or sign a report, the party planning to use the witness must provide a report that discloses the subject matter of the witness's testimony and summarizes the facts and opinions the witness is expected to offer.

##### **B. Arguments in Favor**

- Lawyers and expert witnesses take elaborate and costly steps to avoid creating any discoverable draft report or any discoverable communications between the lawyer and expert. These steps can include hiring two sets of experts, one to testify and one to consult; avoiding any note-taking by the expert; and avoiding the creation of any draft report. At the same time, lawyers take elaborate and costly steps to attempt to discover all of the other side's drafts and communications.
- Experience has shown that the elaborate steps to avoid creating discoverable drafts or communications result in inefficient, costly, and wasteful litigation behavior. At the same time, experience has also shown that extensive, time-consuming, and costly efforts to discover every change in draft reports by experts and every communication between experts and retaining counsel rarely produces information that bears on the strengths or weaknesses of the experts' opinions.

- Many experienced lawyers routinely stipulate that they will not seek to discover draft reports from each other's experts or communications between the experts and the retaining lawyers. That good lawyers stipulate to avoid the present rule indicates problems and the need for amendment.
- The state courts in New Jersey have implemented procedures similar to the proposed amendments. New Jersey practitioners representing both plaintiffs and defendants report a remarkable degree of consensus and enthusiasm about the success of these procedures in improving the ability to use expert witnesses and to discover the basis for their opinions.
- The proposed amendments would not limit discovery into the areas that are genuinely important for learning the strengths and weaknesses of a testifying expert's opinion. The proposed amendments specifically allow discovery into communications between a lawyer and testifying expert about: (1) the compensation for the expert's study or testimony; (2) the facts or data provided by the lawyer that the expert considered in forming opinions; and (3) the assumptions provided by the lawyer that the expert relied upon in forming an opinion.

C. Objections

- The proposed amendments limit discovery that could show the extent of the retaining lawyer's influence on the testifying expert's opinions. That could make it easier for lawyers to influence the opinions their testifying experts present.
- The proposed amendments only limit discovery of draft reports and certain communications. They do not apply to inquiries into such matters at the trial itself. It may be unclear whether the draft reports and communications will be protected from disclosure at trial. As a result, the amendments may not eliminate the costly and wasteful steps to avoid creating draft reports or records of attorney-expert communications.

D. Rules Committees' Consideration

Public comments received during the notice-and-comment period made it clear that the vast majority of practitioners, on both the plaintiff and defense sides, support the proposed rule amendments. The only significant opposition to the amendments was expressed by a group of academics. They voiced concern that the amendments would make it difficult for a party to learn and show the extent to which an expert's opinion was influenced by retaining counsel. They also expressed concern that the amendments would further solidify the adversary role of testifying experts. After extensive study, the rules committees were satisfied that the best means of scrutinizing the merits of an

expert's opinions is by cross-examining the expert on the substantive strengths and weaknesses of the opinions and by presenting evidence bearing on those issues. Discovery into draft reports and all communications between the expert and retaining counsel is not an effective way to learn or expose the weaknesses of the expert's opinions; is time-consuming and expensive; and leads to wasteful and artificial litigation practices to avoid creating such drafts and communications in the first place. Much of the information that would be protected from discovery by the proposed amendments is not now available in discovery because lawyers engage in litigation practices to make sure that no such discoverable information is created. The fact that the proposed protection would not apply at trial is not an argument against this discovery rule; the discovery and evidence rules are not identical. This fact will not vitiate the effectiveness of the amendments for the practical reasons that few lawyers will venture at trial into matters they have not probed in discovery and that many cases settle and never reach trial. The present rule has not in any way reduced the role that expert witnesses play as part of each side's litigation team. The experience of lawyers stipulating around the present rule and of lawyers practicing under the New Jersey rule has confirmed that the proposed amendment does not present an obstacle to exposing the substantive strengths and weaknesses of the other side's experts.

## II. Civil Rule 56

### A. Brief Description

The proposed amendments to Civil Rule 56 are intended to improve the procedures for presenting and deciding summary judgment motions, to make the procedures more consistent across the districts, and to close the gap that has developed between the rule text and actual practice. The amendments are not intended to change the substantive summary judgment standard or burdens. The amendments include: (1) requiring that a party asserting a fact that cannot be genuinely disputed provide a "pinpoint citation" to the record supporting its assertions as to the facts; (2) recognizing that a party may submit an unsworn written declaration, certificate, verification, or statement under penalty of perjury in accordance with 28 U.S.C. § 1746 as a substitute for an affidavit to support or oppose a summary judgment motion; (3) setting out the court's options when an assertion of fact has not been properly supported by the party or responded to by the other party, including giving an opportunity to support or address the fact, considering the fact undisputed for purposes of the motion, granting summary judgment if supported by the motion and supporting materials, or issuing other appropriate order; (4) setting a time deadline, subject to variation by local rule or court order in a case, for filing a summary judgment motion; (5) explicitly recognizing that "partial summary judgment" may be entered; and (6) clarifying the procedure for challenging the admissibility of summary judgment evidence.

### B. Arguments in Favor

- The text of Civil Rule 56 has not been significantly changed in substance for over forty years. During that time, the practice has changed and grown apart from the rule text. The proposed amendments would bring the rule closer to actual practice and make the procedures for bringing and responding to summary judgment motions clearer.
- District courts have prescribed local rules and procedures that are inconsistent in many respects with the national rule and with each other. The fact that there are so many varying local rules demonstrates the inadequacy of the current national rule. By eliminating some of the inconsistencies from district to district, the proposed amendments would promote national uniformity in federal court practice.
- The proposed amendments incorporate and draw on some of the good practices in the local district court rules.
- Under the proposed national rule, district judges remain free to depart from the national rule's timing provisions when warranted by the conditions in a particular district or by the circumstances of a particular case.
- The proposed amendments do not attempt to change the summary judgment standard. As a result, the amendments are neutral in that they do not make it easier or harder to obtain or defeat summary judgment.

C. Objections

- Local district courts should have substantial freedom to choose the summary judgment procedures they wish to follow. The proposed amendments should not try to impose consistency in summary-judgment procedure across the districts.

D. Rules Committees' Consideration

Public comments received during the notice-and-comment period were highly favorable in support of the proposed rule amendments, apart from two aspects of the published proposed rule that have since been abandoned. As published, the proposed amendment carried forward the verb "should" – instead of "shall" – in the standard governing a court's grant of summary judgment, a change implemented in 2007 as part of the style project. The proposed published rule also would have included a provision found in many local rules and individual-judge rules requiring movants to submit a statement of undisputed facts and nonmovants to respond in kind. The proposed amendments return the statement of the summary judgment standard to "shall," which was the basis for years of case-law interpretation, and do not adopt the "point-counterpoint" procedure as the default national rule. The proposed amendments thereby

allow the case law to continue to develop and leave appropriate room for local procedures and experimentation, while clarifying the rule and achieving greater consistency than currently exists. The proposed amendments were widely supported.

## **Federal Rules of Criminal Procedure**

### **I. Criminal Rule 15**

#### **A. Brief Description**

The proposed amendments to Criminal Rule 15 authorize a deposition taken outside the United States to occur without the defendant's presence in limited and carefully defined circumstances. To allow such a deposition, the court must make case-specific findings that: (1) the witness's testimony could provide substantial proof of a material fact in a felony prosecution; (2) there is a substantial likelihood that the witness's attendance at trial cannot be obtained; (3) the witnesses's presence for a deposition in the United States cannot be obtained; (4) the defendant cannot be present at the deposition because it is not possible to transport the defendant to the witness's location; and (5) the defendant can meaningfully participate in the deposition through reasonable means. The amendments do not address the admissibility of the testimony produced by such a deposition.

#### **B. Arguments in Favor**

- The Department of Justice has emphasized that there is a vital need for such depositions in cases in which a critical prosecution witness lives in or flees to another country, outside the subpoena power of the federal courts. Such cases are not common, but when they arise, they can involve important interests. The need is particularly acute in national security cases.
- Several courts of appeals have already authorized such depositions in limited circumstances and under careful court supervision. The proposed amendments draw on the approaches taken in those cases.
- The proposed amendments recognize that technology can allow a defendant in a different location to participate effectively in a deposition, including having private conversations with defense counsel during that deposition.
- These existing precedents have not created a consistent or predictable standard to govern when such depositions are proper and what procedures are necessary. The Department of Justice has urged that a national rule would avoid the uncertainty and confusion caused by different standards developed by individual courts and would give important guidance to both courts and lawyers.

- The high cost and elaborate steps required for a federal prosecutor to depose a witness in a foreign country, particularly a witness in custody in that country, impose practical barriers that effectively limit how often such depositions will be sought. In addition to these practical limitations, the Department of Justice plans to require the approval of the Assistant Attorney General or designee in every case in which the United States seeks to depose a witness under the proposed amendments.

C. Objections

- The creation of a national procedure allowing a deposition of a witness without the defendant present will result in many more such depositions, with the attendant risk that defendants' constitutional rights will be undermined. The taking of a deposition outside the presence of the defendant should be discouraged, not facilitated or regularized.
- Under the Confrontation Clause and the Federal Rules of Evidence, the deponent's testimony will be inadmissible at trial in many, if not most, cases. There is no point in creating a procedure that will rarely, or never, result in evidence admissible at trial.

D. Rules Committees' Consideration

The proposed amendments would create a deposition procedure that would be available only if demanding case-specific standards are met. The standards include the requirement that the defendant be able to participate meaningfully in the deposition. In addition, such depositions are extremely difficult to arrange and take. These practical problems also mean that the procedure will be used only when it is critical to do so, in a very limited number of cases. The Department of Justice made a strong case that although prosecutors will not use this procedure often, when they do, it will be in cases of substantial importance in which the deponent's testimony is critical. The proposed amendments only create a discovery procedure and in no way foreclose challenges to admission of the testimony at trial based on the Confrontation Clause or the Federal Rules of Evidence.