

December 2014 Federal Rules Amendments

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Unless Congress unexpectedly intervenes, amendments to the Federal Rules of Evidence, Federal Rules of Civil and Appellate Procedure, and Federal Rules of Criminal Procedure, approved by the Supreme Court in April 2014, will take effect on December 1, 2014.

Compared to the amendments due to take effect in December 2015 involving substantial changes to the Federal Rules of Civil Procedure governing discovery, the 2014 amendments are less sweeping. Of the 2014 amendments, the more substantive relate to the treatment of prior consistent statements under Rule of Evidence 801(d)(1)(B), business records pursuant to Rules 803(6) and (7), and public records per Rule 803(8). This article summarizes the 2014 amendments, with emphasis on the Federal Rules of Evidence.

2014 amendments to the Federal Rules of Evidence

FRE 801(d)(1)(B)

Rule 801(d)(1)(B) allows for the substantive use of certain prior consistent statements of a witness subject to cross-examination, but excepts from the hearsay rule only those consistent statements offered to rebut allegations of recent fabrication, improper motive, or influence. The amendment—FRE 801(d)(1)(B)(ii)—expands the hearsay exception and states that prior consistent statements can be offered “to rehabilitate the declarant’s credibility as a witness when attacked on another ground.” The amendment answers the question on the minds of scholars and judges since the rule’s enactment 38 years ago, namely: “why the drafters of Rule 801(d)(1)(B) carved out a hearsay exception for prior consistent statements

admitted to repair impeaching attacks on witness motivations, but failed to extend the same treatment to other similarly situated prior consistencies admitted to repair other types of impeaching attacks.”¹

Under the current version of FRE 801(d)(1)(B), prior consistent statements are properly introduced as substantive evidence only if they pertain to recent fabrications, improper motives, or influence. Obvious examples include a plea bargain offered to a prosecution witness or favors given to a defense witness. But the rule does not currently provide for the substantive admissibility of consistent statements probative to explaining an apparent inconsistency such as claims of a faulty memory. Instead, the rule leaves many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness’s credibility.

As noted by the Rules Advisory Committee, the amendment to Rule 801(d)(1)(B) is intended to expand the scope of substantively admissible consistent statements, but such admissibility is still constrained by the Supreme Court’s requirement that consistent statements must be made before the time when any alleged fabrication, influence, or motive arose,² and they are only admissible if the intent is to rehabilitate a witness whose credibility has been attacked. In short, the amendment is not intended to make any consistent statement admissible that was not

admissible previously; the only change is that prior consistent statements otherwise admissible for rehabilitation are now admissible on substantive grounds.

FRE 803(6), (7), and (8)

FRE 803(6) and (7) provide for the admission of business records. FRE 803(8) permits the introduction of public records. Each rule has a “trustworthiness” requirement, and the amendments clarify who has the burden of proof to show lack of trustworthiness. Once the proponent of the business or public record satisfies the requirements for admission, the amendments call for the party opposing admission to bear the burden of proof.

The rule amendments are all substantially similar and support admission of the business or public record unless the opponent shows that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The amendments resolve a split of authority on the question of who bears the burden of “untrustworthiness.”

According to the Rules Advisory Committee notes, it is appropriate to impose on the party opposing admissibility the burden to show a lack of trustworthiness when the proponent satisfies the requirements excepting the record from hearsay. In meeting the

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burden, however, the committee explained that a determination of untrustworthiness depends on the circumstances. For example, a record prepared in anticipation of litigation, favorable to the preparing party, may be deemed untrustworthy without the opponent introducing evidence on the point.

Other rule changes effective December 1, 2014

Federal Rules of Appellate Procedure

Consistent with significant changes in the Federal Rules of Bankruptcy Procedure (not a subject of this article), a new FR App P 6(c) is added to govern the situations in which direct appeal from a bankruptcy court decision to the Court of Appeals is permitted.

Federal Rules of Civil Procedure

Correcting an inadvertent omission that occurred when rules were amended in 2007, FR Civ P 77(c)(1) clarifies that the legal holidays in which a clerk's office may not be opened by court order are those described in Rule 6(a)(6) rather than Rule 6(a)(4). No substantive change is intended.

Federal Rules of Criminal Procedure

Five rules are amended.

Rules 5 and 58, addressing initial appearances and misdemeanors, respectively, are each revised using identical language. The amended rules add a requirement that all defendants be notified that a defendant who is not a United States citizen has a right to ask a federal attorney or law enforcement official to advise a consular official of his or her country of nationality of the defendant's arrest, and that even without the defendant's request, such notification may be required by treaty or other international agreement. Noncitizens have long had the right to this notification, but it has not been codified in the federal rules. The new requirement increases the likelihood that the requisite notification will be given, provides a record of the notification, and, by requiring that all defendants be notified, relieves the prosecution of having to determine the citizenship of defendants.

Amended Rule 12 reorganizes and revises requirements for pretrial motions. Rule 12(b)(1) provides that a pretrial motion may raise any defense, objection, or request that the court can determine without trial on the merits. This provision is relocated, and the term "trial on the merits" replaces the archaic "trial of the general issue." Rule 12(b)(2) provides—as former Rule 12(b)(3) did, using different language—that a motion challenging the court's jurisdiction may be made at any time.

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Rule 12(b)(3) specifies motions that must be made before trial. Subsection (A) contains a new, nonexhaustive list of motions claiming a defect in instituting prosecution that must be brought before trial, identifying improper venue, preindictment delay, a speedy trial violation, selective or vindictive prosecution, and an error in the grand jury proceeding or the preliminary hearing. Subsection (B) of Rule 12(b)(3) adds another nonexhaustive list, this time of motions challenging defects in the indictment or information that must be brought before trial, including duplicity (two or more offenses charged in the same count), multiplicity (charging the same offense in more than one count), lack of specificity, improper joinder, and failure to state an offense. Subsections C, D, and E of Rule 12(b)(3) continue to require that motions to suppress evidence, for severance, and for discovery, must be brought before trial.

Rule 12(c) combines and modifies portions of former Rules 12(c) and 12(e). The new rule permits courts to set and amend deadlines for pretrial motions. Under current Rule 12(e), if a party does not meet the pretrial motion deadline, he or she waives the right to bring the motion. Since waiver

is generally regarded as the intentional relinquishment of a known right, and there is no provision in the rules for determining whether the rights are intended to be waived, the rules change the language. New Rule 12(c)(3) provides that a motion that does not meet the deadline is "untimely" but may still be considered if the party shows good cause—generally defined as requiring proof of both cause and prejudice—or, in the case of a motion claiming failure to state an offense, prejudice, thus implicitly removing the "cause" requirement for such a motion.

Rule 34, entitled "Arresting Judgment," is amended to conform with one of the Rule 12 amendments. Under current Rule 34, the court must "arrest" (withhold or stay) a judgment if it concludes it lacked jurisdiction of the charged offense, or if the indictment or information did not charge an offense. Since Rule 12(b)(3) now provides that challenges to the indictment or information are to be brought before trial, new Rule 34 provides that a judgment must be arrested only for lack of jurisdiction.

Finally, Rule 6 contains a technical amendment to correct a reference to a statute that has been reorganized. ■



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ENDNOTES

1. Richter, *Seeking consistency for prior consistent statements: Amending Federal Rule of Evidence 801(d)(1)(B)*, 46 Conn L R 937 (February 2014).
2. *Tome v United States*, 513 US 150; 115 S Ct 696; 130 L Ed 2d 574 (1995).