

# 2010 Amendments to the Federal Rules

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**A**bsent unanticipated action by Congress before December 1, 2010, amendments to the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Federal Rules of Appellate Procedure, and Federal Rules of Evidence will take effect on that date. None of the amendments is particularly remarkable, but all will have some significance to federal court practitioners. All of the amendments are prospective in application. This article briefly summarizes the 2010 amendments.

## Federal Rules of Civil Procedure

Rule 8 has been amended to delete “discharge from bankruptcy” from the rule’s list of affirmative defenses that must be asserted in a responsive pleading.

The amendments to Rule 26 are perhaps the most significant changes, and they govern the discovery of information from expert witnesses who have been retained to testify at trial. Current Sixth Circuit caselaw provides for discovery of “all documents, including attorney opinion work product, given to testifying experts.”<sup>1</sup> The Rule 26 amendments will operate to limit the scope of expert discovery in this area.

According to the Committee on Rules of Practice and Procedure, the amendments to Rule 26 are intended to curtail expansive discovery so that only the “facts or data considered by the witness” in forming the expert opinions must be disclosed. The result is to extend work-product protection to communications between experts and retaining counsel, including drafts of expert reports, with three exceptions: (1) compensation for the expert’s study or testimony, (2) facts or data provided by the lawyer that the expert considered in forming the opin-

ions, and (3) assumptions provided to the expert by the lawyer that the expert relied on in forming an opinion.

The amendments to Rule 26 are aimed at eliminating a conflict among the federal circuits concerning the scope of discovery for retained experts. However, the amendments also clarify that experts not specifically retained to testify at trial—for example, treating physicians—are not obligated to submit Rule 26 expert reports. In this regard, the amendments conform to current Sixth Circuit practice.<sup>2</sup>

Civil Rule 56 relating to summary judgment has also been extensively revised. The Rule 56 amendments do not change the summary judgment standard or burdens, and they are strictly procedural. Nonetheless, practitioners should be mindful that the procedural changes impose more stringent requirements with respect to record evidence citations in support of or in opposition to a summary judgment motion.

The amendments to Rule 56 include:

- Requiring that a party asserting a fact that cannot be genuinely disputed or can be disputed provide a “pinpoint citation” to the record supporting its fact position.
- Recognizing that a party may submit an unsworn written declaration under penalty of perjury as a substitute for an affidavit to support or oppose a summary judgment motion.
- Setting out the court’s options when a party fails to assert a fact properly or fails to respond to an asserted fact, including affording the party an opportunity to amend the motion, considering the fact undisputed for purposes of the motion (“deemed admitted”), or granting summary judgment.

- Setting a time deadline, subject to variation by local rule or court order in a case, only for the filing of a summary judgment motion.
- Explicitly recognizing that “partial summary judgment” may be entered.
- Clarifying the procedure for challenging the admissibility of summary judgment evidence.

Amended Rule 56 also gives district courts the option to enter a judgment independent of the summary judgment motion. That is, a court may, after giving reasonable notice and a time to respond, grant judgment for a nonmovant or grant the motion on grounds not raised by a party. The amendments to Rule 56 are intended to improve the procedures for presenting and deciding summary judgment motions and to make the procedures more consistent with those already used in many courts.

## Federal Rules of Criminal Procedure

Amendments to Rules 12.3 and 21 are designed to implement provisions of the Crime Victims’ Rights Act, 18 USC 3771, enacted in 2009.

Under Rule 12.3, when a public authority defense is raised, the victim’s address and telephone number are not to be automatically given to the defense. If the defense establishes a need for this information, the court may either order the disclosure of the victim’s address or phone number or fashion some other remedy that allows for the preparation of a defense while protecting the victim’s interests.

The amendment to Rule 21 requires a court considering the transfer of some or all of a proceeding to another district to

take into account not only the convenience of the parties and other witnesses and the interests of justice, but also the convenience of victims.

An amendment to Rule 32.1 clarifies, by codifying caselaw, that a person seeking release from custody in a proceeding to revoke or modify probation or supervised release must demonstrate by clear and convincing evidence he or she is not a flight risk or a danger to the community.

## Federal Rules of Appellate Procedure

A minor amendment to Rule 1 adds a new subsection (3), which defines the word “state” to also include the District of Columbia and any federal territory or commonwealth. Similar minor amendments to Rule 4(a)(7)(A)(i) and (ii) and 4(a)(7)(B) replace references to FR Civ P 58(a)(1) with references to Rule 58(a), consistent with a previous reorganization of that rule.

Amendments are also made to the amicus curiae procedure of Rule 29(c). In addition to some minor reorganization of provisions, an amicus brief must state whether counsel for a party authored the amicus brief in whole or in part; whether a party or party’s counsel contributed money to help fund the amicus brief; and whether some other person, other than the amicus curiae, its members, or counsel, contributed money to help fund the amicus brief. This rule is now generally consistent with Supreme Court Rule 37.6. According to the drafting committee, this amendment “serves to deter counsel from using an amicus brief to circumvent page limits on the parties’ briefs,” and may also help judges to assess “whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.”

## Federal Rules of Evidence

The sole amendment to the evidence rules is to FRE 804(b)(3), the hearsay exception for declarations against penal interest. The rule is amended to extend the corroborating circumstances requirement—previously applicable only to statements offered by crim-

inal defendants—to statements against penal interest offered by the prosecution.

As has long been the case, a statement that, when made, was so far contrary to the declarant’s interests “that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true”<sup>3</sup> will not be excluded by the hearsay rule. Now, however, a statement tending to expose the declarant to criminal liability and offered by *either* party to a criminal case may not be admitted unless “corroborating circumstances clearly indicate the trustworthiness of the statement.”<sup>4</sup> Formerly, this rule applied only when the statement was offered by the criminal defendant in an effort to exculpate himself or herself. The drafters concluded that imposing a requirement designed to avoid the admission of unreliable hearsay only on criminal defendants and not on the prosecution was unfair and contrary to the spirit of the rules. Several courts had imposed the reciprocal obligation on the prosecution even though such an obligation has not been supported by the rule’s language. Such support now exists. ■



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## FOOTNOTES

1. *Regional Airport Authority of Louisville v LFG, LLC*, 460 F3d 697, 717 (CA 6, 2006).
2. *Fielden v CSX Transp, Inc*, 482 F3d 866, 871 (CA 6, 2007).
3. FRE 804(b)(3).
4. *Id.*