# 2010 AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

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Absent contrary action by Congress, important amendments to Rule 26, Rule 56, Rule 8, and Form 52 will take effect on December 1, 2010. Among the most significant amendments are the extension of work product protection to drafts of expert reports and most communications between counsel and retained experts, a new provision requiring experts who do not draft a report to provide more detailed disclosure statements, and a complete rewrite of the rules for summary judgment proceedings (though the substance of the rule remains largely unchanged).

Below is a digest of the amendments,[1] as well as commentary explaining the changes. For quick reference, you may wish to consult the at-a-glance amendment overview sheet available at http://www.csattorneys.com/pdf/2010-FRCP%20Amendments.pdf.

## RULE 26(a)(2) – DETAILED EXPERT DISCLOSURES FROM "NO-REPORT" EXPERTS

### I. PROPOSED AMENDMENTS

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

. . . .

(2) Disclosure of Expert Testimony.

. . . .

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report – prepared and signed by the witness – if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data ~~or other information~~ considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

## II. COMMENTARY

Rule 26(a)(2)(A) currently requires a party to disclose the identity of any witness it may use to present expert testimony at trial. Rule 26(a)(2)(B) requires retained or specially employed experts to prepare an extensive written report, describing their opinions and the bases for them, prior to any deposition of that witness. The purpose behind the (a)(2)(B) expert report requirement is to obviate the need for expert depositions or, even if the expert is deposed, to improve the quality and usefulness of the deposition.

Many courts have been so impressed with the advantages of requiring expert reports for retained experts that they have extended the (a)(2)(B) requirement to all categories of experts, including treating physicians and government investigators. However, many experts falling in the "non-retained" category find it difficult to comply with the (a)(2)(B) requirements, because they have demanding careers outside of giving expert testimony.

The FRCP Advisory Committee, therefore, proposed Rule 26(a)(2)(C) to balance the competing interests. For those experts that traditionally would not have had to file an expert report under Rule 26(a)(2)(B), the new (a)(2)(C) subsection requires them to make certain pre-deposition disclosures. These disclosures are intended to aide counsel in preparing for deposition and trial without overly burdening non-retained experts with a required full-blown expert report.

Like full expert reports under Rule 26(a)(2)(B), disclosures under the new Rule 26(a)(2)(C) are governed by Rule 37(c)(1), which limits the use of information (such as expert opinions) not properly disclosed.

# RULE 26(b)(4) – DRAFTS AND COMMUNICATIONS PROTECTED AS WORK-PRODUCT

## I. PROPOSED AMENDMENTS

Rule 26. Duty to Disclose; General Provisions Governing Discovery

. . . .

(b) Discovery Scope and Limits. . . . .

(4) Trial Preparation: Experts. . . . .

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

## II. COMMENTARY

The wording of Rule 26(a)(2)(B)(iii), which requires that expert reports include "the *data or other information* considered by the witness in forming" the opinions to be expressed, has led to the widespread practice of permitting discovery of communications between an attorney and an expert witness as well as drafts of expert reports. Rule 26(a)(2)(B)(iii) has been amended to require the inclusion of "*the facts or data* considered by the witness." The amendments to Rule 26(b) further clarify the discoverability of expert reports and communications with experts.

Rule 26(b)(4)(B) extends the protections of the work-product doctrine to drafts of Rule 26(a)(2) expert reports and disclosures. Rule 26(b)(4)(C) extends those same work-product protections to most communications between an attorney and an expert that is required to submit an expert report. Three categories of communication are excluded from the protections of Rule 26(b)(4)(C): (1) communications related to the expert's compensation; (2) communications indentifying the facts or data that the attorney is providing and that the expert is relying upon; and (3) communications identifying assumptions that the attorney is providing and that the expert is relying upon.

# RULE 56 – RESTORATION OF "SHALL" AND ELIMINATION OF POINT-COUNTERPOINT

## I. PROPOSED AMENDMENTS[2]

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. The court **shall** grant summary

judgment if the movant shows that there is no genuine **dispute** as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objecting That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or
(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact – including an item of damages or other relief – that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court – after notice and a reasonable time to respond – may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

## II. COMMENTARY

In 1991, the Judicial Conference Standing Committee on the Rules of Practice and Procedure began a style revision project. A style subcommittee was formed, chaired by Professor Charles Alan Wright of the University of Texas Law School. Professor Wright asked Bryan Garner to assist the style subcommittee, and this partnership ultimately led to the preparation of a common set of style preferences – the *Guidelines for Drafting and Editing Court Rules*. The appellate rules were restyled first, becoming effective in 1998, followed by the criminal procedure rules, which became effective in 2002. In 2005, the Standing Committee published for comment the restyled civil procedure rules.

As a part of the style revision project, the Committee altered the language of Rule 56 to, among other things, replace the word "shall," which the *Guidelines* deemed ambiguous, with the word "should." This alteration, though intended only to clarify the wording of the rule without changing its effect, garnered much attention and debate. The Committee considered both retaining "should" and also replacing it with "must." Ultimately, however, the Committee realized that the body of case law construing Rule 56's original "shall" language had become too sacred to alter. The amended rule restores "shall" to its proper place.

The Committee also removed what it referred to as the "point-counterpoint" mandate of former Rule 56(c)(2). The point-counterpoint provision required a movant to identify the claims for which it was seeking summary judgment and state material facts in separately numbered paragraphs. The nonmovant was then required to respond to in correspondingly numbered paragraphs. The point-counterpoint procedure was based upon the local rules of more than 20 districts. Despite the procedure's general merit in most cases, the Committee determined after public comment and debate that the time had not yet come to mandate the procedure for all federal cases. The amended rule removes the point-

counterpoint procedure as a requirement, though many individual districts retain the procedure in their Local Rules.

The amendment alters the familiar "genuine issue of material fact" language to better reflect the meaning of that phrase as it is understood by courts and practitioners. The language now reads "genuine *dispute* as to any material fact."

The amendment also adds a requirement that courts "should state on the record the reasons for granting or denying the motion." This requirement should help practitioners in preparing for trial and appellate courts in reviewing summary judgment decisions.

## RULE 8 – "DISCHARGE IN BANKRUPTCY" NOT AN AFFIRMATIVE DEFENSE

### I. PROPOSED AMENDMENTS

Rule 8. General Rules of Pleading.

. . . .

(c) Affirmative Defenses.

(1) *In General.* In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- ~~discharge in bankruptcy;~~ . . . .

### II. COMMENTARY

The Judicial Conference Standing Committee on the Rules of Practice and Procedure and the Advisory Committee on Federal Rules of Civil Procedure determined that it is confusing to describe "discharge in bankruptcy" as an affirmative defense, because 11 U.S.C. §§ 524(a)(1) and (2) void judgments to the extent that they determine personal liability of a debtor with respect to a discharged debt, and those sections operate as an injunction against the commencement of an action to recover a discharged debt.

## FORM 52 – ADDITIONAL DISCLOSURES ADDED TO FORM

### I. PROPOSED AMENDMENTS

Form 52. Report of Parties' Planning Meeting

1. The following persons participated in a Rule 26(f) conference on [date] by [state the method of conferring].

. . . .

3. Discovery plan. The parties propose this discovery plan:

. . . .

(b) Disclosure or discovery of electronically stored information should be handled as follows: (briefly describe the parties' proposals, including the form or forms for production)

(c) The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: (briefly describe the provisions of the proposed order). . . . .

## II. COMMENTARY

The amendments to Form 52 are technical additions to ensure that the illustrative form better matches the requirements of the rules.

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[1] Unless otherwise noted, additions are indicated by underlining and ~~deletions~~ are indicated by striking through.

[2] Though the content of Rule 56 is largely the same, the wording and organization are almost entirely different. Thus, instead of underlining and striking through to indicate amendments, significant changes are indicated by underlining and/or **bold** typeface.