

Changes to discovery, summary judgment rules likely

Federal civil procedure amendments expected to take effect Wednesday

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Beginning Wednesday, attorneys who practice in federal court will have greater work-product protection for draft reports generated by their expert witnesses under forthcoming changes to civil procedure rules.

These lawyers also expect to face changes to information they must include in their requests for summary judgment.

The Supreme Court last spring approved the changes to the Federal Rules of Civil Procedure that govern disclosures regarding experts and summary judgment. Absent action from Congress early this week, the

amendments to rules 26 and 56 will become effective Dec. 1.

Expert-related disclosures

The amendments to Rule 26 will provide that all communications between attorneys and their experts are private except for conversations related to the experts' compensation

for their reports and testimony; the facts and data the experts considered in forming their final opinions; and any assumptions the experts relied on in forming their opinions.

The experts' drafts, preliminary views often sought in discovery by the opposing side, will be protected under

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the work-product privilege and need not be disclosed.

"That's a significant [and] a welcome change," said Baltimore federal court litigator Gerard J. Gaeng. "It will reduce a lot of gamesmanship that exists now."

That gamesmanship includes the opposing side requesting the draft opinions during pretrial discovery, Gaeng said.

To combat these requests, lawyers often advise their experts not to put fleeting thoughts on paper, lest these early opinions — which may conflict with their final conclusion — be disclosed to the other side, he added.

"A lot of time is wasted in expert discovery to try to uncover every draft and every communication" between the lawyer and the expert, Gaeng said.

"It is not really essential to the fact-finding process."

Under the amended rule, lawyers will be able to communicate more freely with their experts while they are preparing their reports, knowing that these communications will be protected under the work-product privilege, he added.

"A litigator wants to be able to talk to his or her expert without fear of becoming a witness in the case," said Gaeng, of **Rosenberg|Martin|Greenberg LLP** in Baltimore.

Attorney J. Bradford McCullough, who also litigates in federal court, said the amendment will end the all-too-often practice of litigants "spending a lot of time in depositions trying to go into all communications between the lawyer and the expert."

The amended rule, by protecting

preliminary discussions from disclosure, is "going to make expert discovery less costly and more efficient and more substantive," said McCullough, of **Lerch, Early & Brewer Chtd.** in Bethesda.

The amendment recognizes that "the best way to attack is on the merits of the claim" and not on how many conversations the expert had with counsel, McCullough added.

Summary judgment changes

In contrast to the rule on disclosure, changes to the summary judgment rule are largely procedural and will not alter the summary judgment standard or significantly burden attorneys, Gaeng said.

For example, the amendments explicitly recognize that an attorney may seek and a judge may order "partial summary judgment," which is already being done in the federal court system.

"The rule is catching up with practice," Gaeng said.

Attorney Mark S. Saudek agreed, but predicted that codifying the practice in the federal rules will spur more motions for partial summary judgment from attorneys and more grants from judges.

The availability of partial summary judgment "encourages parties to file motions on discrete parts of the case ... so the scope of trial, if trial occurs, will be narrowed considerably," said Saudek, a federal court litigator at **Gallagher, Evelius & Jones LLP** in Baltimore.

Also under the amended rule, parties moving for summary judgment will have to provide a "pinpoint citation" to the record to support their argument that a relevant fact is either not in dispute or cannot be disputed.

Like partial summary judgment, pinpoint citations have been an informal briefing practice in the federal courts for some time, said Baltimore federal court litigator Lawrence S.

Greenwald.

"The requirement of pinpoint citation seems to formalize what is the practice of local rules and of many attorneys in either filing or opposing a motion for summary judgment," said Greenwald, of **Gordon, Feinblatt, Rothman, Hoffberger & Hollander LLC**. "It is a good practice that a lot of lawyers follow in any event."

Other summary judgment amendments will do the following:

- Permit a party to submit an unsworn written declaration under penalty of perjury as a substitute for an affidavit to support or oppose a summary judgment motion;

- Set out the court's options when a party fails to assert a fact properly or a party fails to respond to an asserted fact — including affording the party an opportunity to amend the motion, considering the fact to be undisputed or "deemed admitted" for purposes of the motion or granting summary judgment;

- Set a time deadline, subject to variation by local rule or court order in a case, for the filing of a summary judgment motion;

- Clarify the procedure for challenging the admissibility of summary judgment evidence.

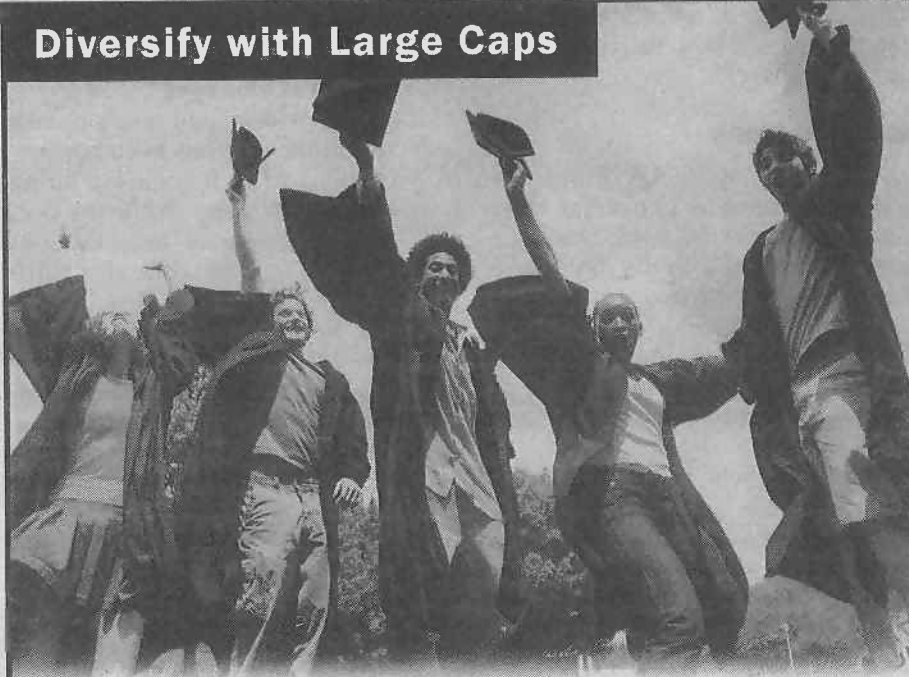
A report issued this year by the Judicial Conference Advisory Committee on Civil Rules stated that the civil procedure amendments are intended to improve the procedures for presenting and deciding summary judgment motions, make the procedures more consistent across the districts and close any gap that has developed between the rule and actual

practice.

Saudek, of Gallagher Evelius, said the amended rule is also a step in "the continuing march of the federal courts to streamline and increase the use of summary judgment in weeding out cases that shouldn't go to trial."

Minnesota Lawyer's Michelle Lore contributed to this report.

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