

A PRACTITIONER'S GUIDE TO NEGOTIATING THE AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

BY: Gregory C. Cook and Sean W. Shirley

The Supreme Court issued Amendments to the Federal Rules of Evidence, effective December 1, 2000. This Article provides a practical overview of the amendments and tips to take advantage and avoid the pitfalls they may create.

I. Amendments Affecting Pre-trial Practice

A. Rule 103(a): Definitive Ruling on the Admissibility of Evidence

1. Substantive Changes to Rule 103

The amendments change Rule 103(a) to resolve a procedural question that split the circuits: Is a party losing an evidentiary objection required to renew an objection or make an offer of proof in order to preserve the right to appeal the error?¹ The Rule, as amended, now clearly states that there is no need to renew an objection at trial once a definite evidentiary ruling has been made (whether that ruling is based upon a pre-trial motion *in limine* or by an earlier ruling during the trial):

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.²

Notably, the new amendment only applies to "definitive ruling[s]." Given the changing circumstances and evolving evidence that accompany a trial, it is often not clear when a ruling is "definitive." Accordingly, the amendment places an affirmative burden on the litigant to determine if a pre-trial motion *in limine* has been ruled upon, or whether a ruling has been implicitly reserved or is provisional. The scenario is further complicated if the court revisits the decision, changes its initial decision, or the opposing party violates the terms of the initial ruling. The Rule does not address whether a party who loses a pre-trial motion *in limine* to exclude the evidence may appeal the decision after offering the evidence on direct examination in order to "remove the sting" of its anticipated prejudicial effect; instead, the amendment defers to existing case law.³

2. Practice Pointers

First, as difficult as this may be, request the judge to make a direct ruling on all of the evidence; ask for the words "definitive ruling." Second, pay attention. Nothing in the rule precludes the opposition from offering evidence that has been excluded by a pre-trial motion *in limine*. If the judge mistakenly admits the evidence and the litigant fails to object, the right to appeal has likely been waived. Third, object anyway. Even if a definitive ruling was made before trial, object to the admission of the evidence at trial. The judge may reconsider the previous ruling or inadvertently sustain the objection thereby placing the burden back on the movant. Fourth, remember that this amendment does not alter the requirement in Fed. R.C.P. 72(a) (and 28 U.S.C. § 636(b)(1)) to object in writing to various orders of magistrates (such as a motion *in limine*) within 10 days of receipt of the order or risk losing the right to appeal.⁴

B. Rules 803 & 902: Authentication of Business Records

1. Substantive Changes to Rules 803 & 902

Rules 803 and 902 were amended expressly to allow business records to be authenticated without calling a foundation witness

to testify at trial. Rule 803 now provides:

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification.⁵

Rule 902(11) provides that extrinsic evidence of authenticity is not required as a condition precedent to admissibility of domestic business records when the offering party provides a written declaration by its custodian or other qualified person stating that (1) the record was made at or near the time of the occurrence of the matters set forth by a person with knowledge of those matters; (2) was kept in the ordinary course of business; (3) was made as a part of the regularly conducted activity as a regular practice; and (4) the person intending to offer the evidence provides notice to all adverse parties, makes the record available for inspection prior to offering the evidence, and allows the adverse party a fair opportunity to challenge the evidence.⁶ Rule 902(12) is substantially the same as Rule 902(11) except it applies to foreign business records and requires the declaration to be signed in a manner that would subject the declarant to criminal penalties under the laws of the country where the declaration is signed.

2. Existing Law Unaltered by the Amendments to Rules 803 and 902

The amendments to Rules 803 and 902 do not alter the requirements of a declaration made in a civil proceeding pursuant to 28 U.S.C. § 1746; therefore, a declaration that satisfies those requirements also satisfies the requirements of amended Rule 902(11). Foreign records in a criminal proceeding could previously be authenticated and admitted pursuant to 18 U.S.C. § 3505; Rule 902(12) now provides a comparable civil mechanism.

3. Practice Pointers

Although not intended, the Rules have the effect of shifting the burden of proving authenticity. After the records have been authenticated by a properly executed declaration, the party challenging the authenticity must produce affirmative evidence that the document is objectionable. Likely, this challenge will be at a hearing in front of a judge rather than on a cross examination in front of a jury; therefore, the opposing party will have difficulty limiting the weight of such evidence.

The offering party should provide written notice well before the trial, to ensure obtaining the advantages of Rules 902(11) and (12). Preferably, the notice deadlines should become a standard part of a pre-trial order.

II. Amendments Affecting Trial Procedure

A. Rule 404: Character of the Victim (Change to criminal rule only)

1. Substantive Changes to Rule 404

Prior to the revision of Rule 404(a)(1), the criminally accused could

attack a pertinent character trait of the victim in order to demonstrate that the victim was the first aggressor without "opening the door" to a collateral attack by the prosecution.⁷ The Rule, as amended, eliminates such a safe harbor. The rule provides that evidence of character may not be offered to prove conformity therewith on the occasion in question, except:

(1) Character of accused: Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of the accused offered by the prosecution;⁸

The amendment is designed to permit a more balanced approach and prevent the accused from excluding evidence that would allow the jury to determine who was the first aggressor. For example, a murder defendant claiming self-defense could escape a character inquiry and create reasonable doubt merely by offering evidence of the alleged victim's propensity for violence. As amended, the Rule prevents an accused from shielding himself from an equally probing and relevant inquiry.

As the amendment is to Rule 404(a)(1), proof of character can only be established by way of reputation or opinion.

2. Existing Law Unaltered by the Amendment to Rule 404

The amendment to Rule 404 does not affect the other Rules that specifically create exceptions to the general rule precluding character evidence offered to demonstrate conformity on the occasion in question. Under Rule 404(b), evidence of prior bad acts is still admissible for a purpose other than proving character. The standards for admitting evidence of collateral sexual behavior or misconduct under Rules 412 through 415 remain the same. In addition, the amendment to Rule 404 does not allow a prosecutor to attack the character of the accused when the accused offers character evidence for a purpose other than to prove the victim acted in conformity therewith. For example, the accused is not subject to a collateral character attack when he offers character evidence of the victim to show the effect on his state of mind⁹ or for the purposes of impeachment under Rules 608 or 609.

3. Practice Pointers

In order to prevent the accused from being subjected to a collateral character attack, offer the character evidence to prove something other than conformity. As the comments make clear, the accused can offer character evidence of the victim in order to negate the *mens rea* element of a crime without "opening the door" to the prosecution. Also, don't forget the viability of the other Rules in order to preclude a collateral character attack. For example, the probative value of the evidence offered by the prosecution in rebuttal may be substantially outweighed by its prejudicial effect, or the witness may lack the requisite first-hand knowledge to testify.

B. Rule 701: Opinion Testimony by Lay Witnesses

1. Substantive Changes to Rule 701

A common problem created by the language of former Rule 701 is that litigants sought to introduce expert testimony via lay witnesses. The amendment to Rule 701 exposes a lay witness to the same level of scrutiny as a witness tendered as an expert under Rule 702 when the testimony is based on scientific, technical, or other specialized knowledge.

The Rule has a two-fold purpose: to prevent litigants from eliciting testimony based on scientific, technical, or other specialized knowledge from individuals who could not meet the qualification standards of Rule 702, and to prevent litigants from avoiding the expert disclosure requirements set forth in Federal Rule of Civil Procedure 26 and Federal Rule of Criminal Procedure 16. The amendment creates a clearer dichotomy between Rules 701 and 702. The testimony, not the qualifications of the witness, determines admissibility. In this light, any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge subjects the witness to scru-

tiny under Rule 702. The distinction was best characterized in *State v. Brown* where the Tennessee Supreme Court noted that a lay witness could testify that a substance appeared to be blood; however, a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma.¹⁰

2. Existing Law Unaltered by the Amendment to Rule 701

The amendment to the Rule is not intended to affect the admissibility of testimony that is within the realm of understanding of lay witnesses: "the appearances of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, etc."¹¹ Similarly, the amendment does not purport to require a lay witness to be qualified as an expert when the witness demonstrates first-hand knowledge of the subject matter of the dispute. For example, a business owner is competent to testify as a lay witness about the operations of his business or, perhaps, about damages sustained to his business,¹² or a drug user could testify about the identity of a drug.¹³

3. Practice Pointers

Rule 701 provides an avenue to exclude potentially damaging testimony during direct testimony. As the Rule precludes a lay witness from giving testimony on scientific, technological, or specialized knowledge without meeting the standards of Rule 702, any portion of the testimony that delves into these areas is objectionable. There will likely be considerable disagreement and uncertainty about what constitutes scientific, technological or "other" specialized knowledge. The safer practice for the party offering the evidence is to disclose the testimony as if it were expert testimony subject to Rule 702.

C. Rule 702: Testimony by Experts

1. Substantive Changes to Rule 702

The amendment to Rule 702 reaffirms the court's gatekeeper function in response to the expert qualification standards articulated in *Daubert v. Merrell Dow Pharm., Inc.*¹⁴ and clarified in *Kumho Tire Co. v. Carmichael*.¹⁵ The Rule, as amended, provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, (3) the witness has applied the principles and methods reliably to the facts of the case.¹⁶

2. Existing Law Unaltered by the Amendment to Rule 702

The Rule is consistent with case law interpreting *Daubert*. The amendment does not purport to codify the specific factors of *Daubert*;¹⁷ instead, the amendment is sufficiently broad enough to encompass all of the *Daubert* factors, while giving the trial court discretion in determining what factors are relevant in considering the reliability of expert testimony. The amendment is not intended to exclude testimony where there are competing theories or methodologies in a particular field of expertise,¹⁸ or to create the inference that because one party's expert is considered reliable, that the other party's is not. Further, nothing in the amendment prevents a witness from being qualified as an expert based upon experience, rather than knowledge.

D. Rule 703: Bases for Opinion Testimony by Experts

1. Substantive Changes to Rule 703

The amendment to Rule 703 makes clear that (1) only the expert's opinion may rest on inadmissible evidence, and (2) there is a presumption against disclosure of such inadmissible evidence. The Rule, as amended, provides:

[T]he facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court

determines that their 's opinion substantially outweighs their prejudicial effect.¹⁹

When information is reasonably relied upon by an expert and is admissible for the limited purpose of assisting the jury in evaluating the expert's opinion, the trial court must engage in an affirmative balancing test that mirrors the test for admitting prior convictions against a criminally accused for purposes of impeachment under Rule 609(a) (1). Even if the substantial hurdle for admissibility is negotiated, the trial judge must give a limiting instruction, pursuant to Rule 105, that the information may not be used for substantive purposes.

2. Existing Law Unaltered by the Amendment to Rule 703

The amendment only governs the disclosure of inadmissible evidence to the jury, and it is not intended to affect the admissibility of an expert's testimony or prevent an expert from relying on information that is inadmissible for substantive purposes. The amendment does not prevent the opposing party from introducing facts or data relied upon by the expert in order to attack the credibility of the expert.

3. Practice Pointers

Cross-examine with caution. Despite the affirmative balancing test, in some circumstances a litigant may still be allowed to disclose facts made the basis of the expert's opinion in order to remove the sting from the adverse party's cross-examination. In this light, a party attacking the credibility of the opposition's expert by introducing the facts forming the basis of the opinion "opens the door" to rebuttal testimony regarding the information, despite the fact that the information would have been inadmissible on direct. Accordingly, a vigorous cross-examination may elicit far more damaging testimony on rebuttal and prevent the cross-examining party from obtaining the Rule 105 limiting instruction. Even if the door is not opened, the proponent of the evidence may elicit testimony of the fact that the expert relied upon certain inadmissible evidence. They may not, however, introduce the evidence.

End Notes

- 1 Compare *Rosenfeld v. Basquiat*, 78 F.3d 84 (2d Cir. 1996) (holding that renewal is not required if the issue decided is one that (1) was fairly presented to the trial court for an initial ruling, (2) may be decided as a final matter before the evidence is actually offered, (3) was ruled on definitively by the trial judge); *Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993) (distinguishing between objections, which must be renewed when the evidence is offered, and offers of proof, which need not be renewed after a definitive determination is made that the evidence is inadmissible); and *Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980) (holding that a renewal at the time the evidence is offered at trial is required)
- 2 FED.R.EVID. 193(9a) (underlined text quoted from the rules indicates the changes to the rule)
- 3 Compare *United States v. Fisher*, 106 F.3d 622 (5th Cir. 1997) (holding that the defendant did not waive his right to appeal a pre-trial ruling that the defendant's prior conviction could be used for impeachment purposes by introducing the evidence on

- direct examination); *Judd v. Rodman*, 105 F.3d 1339 (11th Cir. 1997) (finding an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence on direct examination); *Gill v. Thomas*, 83 F.3d 537 (1st Cir. 1996) (finding that the defendant waived the right to appeal by offering the objectionable evidence on direct); and *United States v. Williams*, 939 F.2d 721 (9th Cir. 1991) (same)
- 4 Note the change to Rule 103 also does not alter certain other rules such as the rule set forth in *Luce v. United States*, 469 U.S. 38 *1984). In *Luce*, the Supreme Court held that a criminal defendant must testify in order to appeal a pre-trial ruling admitting the defendant's prior convictions for impeachment purposes in order to preserve a claim of error
- 5 FED.R.EVID. 803(6)
- 6 See FED.R.EVID. 902(11)
- 7 See *United States v. Fountain*, 786 F.2d 790 (7th Cir. 1985) (holding that the accused's character cannot be attacked when he offers proof that the victim was the first aggressor)
- 8 FED.R.EVID. 404(a)(1)
- 9 See *United States v. Burks*, 470 F.2d 432 (D.C.Cir. 1972) (holding that evidence of the violent character of the victim was admissible on the issue of whether or not the defendant reasonably feared he was in imminent danger of bodily harm)
- 10 See *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992)
- 11 *Asplundh Mfg. Div. V. Benton Harbor Eng'g.*, 57 F.3d 1190, 1196 (3d Cir. 1995)
- 12 See *Lighting Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993) (finding no abuse of discretion where the trial judge allowed the business owner to testify regarding his damages because the testimony was based upon personal experience)
- 13 See *United States v. Westbrook*, 896 F.2d 330 (8th Cir. 1990) (holding that two witnesses who were heavy amphetamine users could testify as lay witnesses). *But see United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (finding that a witness would have to be qualified as an expert if the witness were to describe how a drug was manufactured)
- 14 509 U.S. 579 (1993)
- 15 526 U.S.137 (1999) (holding that the Daubert standard applies to all expert testimony, not just testimony based on scientific knowledge)
- 16 FED.R.EVID. 702
- 17 See, e.g., *United States v. 14.38 Acres of Land Situated in Leflore Cty., Miss.*, 80 F.3d 1074 (5th Cir. 1996)(holding that *Daubert* did not work a "change over federal evidence law" and "the trial court's role as a gatekeeper is not intended to serve as a replacement for the adversary system")
- 18 See, e.g., *Heller v. Shaw Indus., Inc.*, 167 F.3d 146 (3rd Cir. 1999) (finding that expert testimony cannot be excluded simply because the expert applies a different methodology when both tests are accepted in the field and both reach reliable results); *Ruiz-Troche v. Pepsi Cola*, 161 F.3d 77 (1st Cir. 1998) (finding that *Daubert* does not empower trial courts to determine which of the several competing scientific theories is the most reliable)
- 19 FED.R.EVID. 703

2001 SPRING PICNIC

JUNE 8, 2001

BAR-B-CUE, BEANS, CHICKEN & THE WORKS!