

Changes to the Federal Rules – 2024

William L. Doerler
The Subrogation Strategist
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Unless Congress moves quickly, several amendments to the Federal Rules of Civil Procedure and Evidence will take effect December 1, 2024. Below is a brief description of the amendments.

Rules of Evidence

Rule 107 is a new rule. This rule addresses illustrative aids, stating that, if such aid helps the trier of fact to understand the evidence or an argument, a party may use the aid if its utility is not substantially outweighed by the danger of, among other things, unfair prejudice. As noted under the discussion of Rule 1006, below, an illustrative aid - offered only to help the trier of fact understand the evidence - is generally not admissible into evidence.

Rule 613 currently states that extrinsic evidence of a witness's prior inconsistent statement is admissible *only if* the witness is given an opportunity to explain or deny the statement *and* the adverse party is given an opportunity to examine the witness about it, or if justice so requires. As amended, the court has the discretion to forego this requirement.

Rule 801(d)(2) discusses statements that are not hearsay, in particular statements made by an opposing party. The amended rule adds the following:

If a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

By adding this language, "when a party stands in the shoes of a declarant or the declarant's principal, hearsay statements made by the declarant or principal are admissible against the party." The amendment refers to the "declarant's principal" because "the statement may have been made by the agent of a person or entity whose rights or obligations have been succeeded to by the party against whom the statement is offered." Thus, under the new rule, a statement against interest by the predecessor-in-interest of a party-opponent (which would otherwise be hearsay) may be used against a successor-in-interest.

Rule 804(b)(3), discussing exceptions to the hearsay rule when the declarant is unavailable, currently states that a declaration against interest, if made in a proceeding which subjects the declarant to criminal liability, must be supported by corroborating circumstances. The amendment requires that a court consider not only the totality of the circumstances, but whether there is any evidence supporting or undermining the statement.

Rule 1006, which discusses summaries offered to prove the contents of voluminous evidence, currently allows the proponent of such evidence to use a summary to prove the contents of writings, recordings or photographs. The amendment allows the court to admit a summary offered to prove *admissible* evidence, even if the document themselves are not introduced into evidence. The amendment distinguishes between a summary of voluminous documents (which, itself, is evidence and governed by Rule 1006) and a summary that merely helps the trier of fact to understand admissible evidence (which is not evidence and covered by new Rule 107).

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Federal Rules of Civil Procedure

Rule 12 prescribes the time to serve responsive pleadings. The amendment clarifies that a different response time set by statute supersedes the time to serve responsive pleadings set forth in paragraphs (1), (2), and (3).

Subrogation practitioners, whether they are likely to appear in court or not, should – assuming the changes are implemented – be aware of these proposed rule changes so that they can better understand the proof needed in a particular case.

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.

