

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental law database of JAGCNET, accessed via the Internet at <http://www.jagcnet.army.mil>.

DOD Range Rule Withdrawn With a View Towards Reproposal

During the Department of Defense's (DOD) Environmental Cleanup Stakeholders Forum in St. Louis, Missouri, in November 2000, the Deputy Under Secretary of Defense (Environmental Security), Ms. Sherri Goodman, announced that she had withdrawn the Range Rule¹ from the Office of Management and Budget (OMB), with the intent to repropose the Rule.²

As Ms. Goodman pointed out, she withdrew the rule from the OMB for several reasons. First, DOD and the Environmental Protection Agency (EPA) must resolve difficult issues, especially the role of explosives safety. Second, as the Environmental Council of the States and National Association of Attorneys General pointed out to DOD, after several years of sorting through and refining the draft range rule, it is time to step back and hear from all the stakeholders and state regulators. Third, all the parties involved must achieve a greater understanding and consensus regarding the processes, tools, techniques, and end goals of the unexploded ordnance cleanup

program. Keeping the Range Rule at OMB excludes further input from our community and state stakeholders. Finally, as DOD develops the major initiative of defining a range sustainment program, Ms. Goodman wants to be sure that everyone's concerns are included in that process.

In the interim, DOD will issue a DOD Directive (DODD) and DOD Instruction (DODI) to provide consistent guidance regarding how to proceed with a closed, transferred, and transferring range response program. The *DOD Policy for Closed, Transferred, and Transferring Ranges Containing Military Munitions Fact Sheet*³ and the outlines for the proposed DODD and DODI were provided for public comment at DOD's Environmental Clean-up Stakeholders Forum.

Environmental law specialists should continue to use DOD and EPA's interim final guidance for implementing response actions⁴ until DOD issues the DODD and DODI. Lieutenant Colonel Schenck.

New Executive Order on Tribal Consultation

On 6 November 2000, President Clinton signed Executive Order (EO) 13,175, *Consultation and Coordination with Indian Tribal Governments*.⁵ Consistent with the Presidential Memorandum of 29 April 1994, *Government-to-Government Relations with Native American Tribal Governments*, EO 13,175 recognizes the following fundamental principles: (1) Indian tribes, as domestic dependent nations, exercise inherent sovereignty over their lands and members; (2) the United States government has a unique trust relationship with Indian tribes and deals with them on a government-to-government basis; and, (3)

1. Closed, Transferred and Transferring Ranges Containing Military Munitions, 62 Fed. Reg. 50,796 (proposed 26 Sept. 1997) (to be codified at 32 C.F.R. pt. 178). The proposed rule is summarized as follows:

The Department of Defense (DoD) is proposing a rule that identifies a process for evaluating appropriate response actions on closed, transferred, and transferring military ranges. Response actions will address safety, human health, and the environment. This rule contains a five-part process that is not inconsistent with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and is tailored to the special risks posed by military munitions and military ranges. All closed, transferred, and transferring military ranges will be identified. A range assessment will be conducted in which a site-specific accelerated response (various options for protective measures, including monitoring) will be implemented. If these measures are not sufficient, a more detailed site-specific range evaluation will be conducted. Recurring reviews will be conducted, and an administrative close-out phase also is included.

Id.

2. The full text of Ms. Goodman's remarks is available at <http://www.denix.osd.mil/denix/Public/ES-Programs/Speeches/speech-68.html>.

3. U.S. DEP'T OF DEFENSE, FACT SHEET, DOD POLICY FOR CLOSED, TRANSFERRED, AND TRANSFERRING RANGES CONTAINING MILITARY MUNITIONS (Nov. 2000), available at <http://www.denix.osd.mil/denix/Public/ES-Programs/Cleanup/RangeFact/forum1.html> (containing outlines for the proposed DODD and DODI).

4. Memorandum, DOD and EPA Management Principles for Implementing Response Actions at Closed, Transferring, and Transferred (CTT) Ranges (7 Mar. 2000), available at <http://www.dtic.mil/envirodod/UXO-Mgt-Principles.pdf>.

5. 65 Fed. Reg. 67,249 (6 Nov. 2000) (superseding Exec. Order No. 13,084, *Consultation and Coordination with Indian Tribal Governments*, 63 Fed. Reg. 27,655 (May 14, 1998)).

Indian tribes have the right to self-government and self-determination.⁶

When developing and implementing “policies that have tribal implications,”⁷ section 3 of EO 13,175 directs federal agencies to adhere to the fundamental principles listed above in order to “respect Indian tribal self-government and sovereignty, to honor tribal treaty rights and other rights, and to strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.”⁸ In addition, federal agencies are required, when developing such policies, to encourage tribal development of policies to meet the agency’s program objectives, to defer to tribally established standards, and to consult with tribes to consider the need for federal standards and alternatives that would preserve tribal authority and prerogatives.⁹

The EO also imposes significant new responsibilities on federal agencies that promulgate regulatory policies or rules that impact tribes or tribal governments. By February 2001, each federal agency must designate an official responsible for implementing the order.¹⁰ By March 2001, the designated agency official must submit documentation to the OMB describing the agency’s process for ensuring timely and meaningful consultation with tribes early in the rule-making process.¹¹

Prior to going forward with any regulation that imposes substantial direct compliance costs on a tribal government¹² or any regulation that preempts tribal law, an agency must meet several cumbersome procedural requirements. The agency must consult with affected tribes early in the promulgation process, prepare a tribal summary impact statement as part of the regulation’s preamble, and submit to the Director, OMB, any written communications from tribal officials.¹³ When transmitting

a draft final regulation with tribal implications to OMB, the agency must certify that “the requirements of EO 13,175 have been met in a meaningful and timely manner.”¹⁴

How will this impact the Army in its day-to-day operations? Initially, it is important to note that EO 13,175 is not limited to natural and cultural resource actions; it applies to any regulations or policies that have the potential to directly impact tribes, tribal governments and tribal resources. At Headquarters, Department of the Army (HQDA), EO 13,175 imposes several new responsibilities. Headquarters, Department of the Army must designate an agency official responsible for implementing EO 13,175 and forwarding a tribal consultation procedure to OMB. In addition, HQDA and the secretariat will need to ensure that proposed regulations and policies are reviewed early in the developmental process for potential impacts to tribes, tribal resources or tribal governments. Where such impacts are identified, HQDA and the secretariat must determine whether any of the requirements of EO 13,175 apply.

At the local installation level, EO 13,175 will apply to “policy statements or actions that have substantial direct effects on one or more tribes.”¹⁵ This term is not defined in EO 13,175, and will be subject to interpretation by local decision makers. Management plans that impact tribally protected resources are the types of “actions” most likely to trigger section 3 of EO 13,175.¹⁶ For all practical purposes, section 3’s requirements can be met by consultation with federally recognized Indian tribes in accordance with the principles and procedures set forth in the *Department of Defense American Indian and Alaskan Native Policy*,¹⁷ and *Department of the Army Pamphlet 200-4’s Guidelines for Army Consultation with Native Americans*.¹⁸

6. Exec. Order. No. 13,175, § 2, 65 Fed. Reg. 67,249.

7. The EO broadly defines “policies that have tribal implications” as “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.” *Id.* § 1(a), 65 Fed. Reg. at 67,249.

8. *Id.* § 3, 65 Fed. Reg. at 67,249-50.

9. *Id.* § 3(c), 65 Fed. Reg. at 67,250.

10. *Id.* § 5, 65 Fed. Reg. at 67,250.

11. *Id.*, 65 Fed. Reg. at 67,250.

12. These requirements only apply to proposed regulations that are not mandated by statute.

13. Exec. Order. No. 13,175, § 5, 65 Fed. Reg. at 67,250.

14. *Id.* § 7, 65 Fed. Reg. at 67,251. Similar certification requirements apply to proposed legislation with tribal impacts submitted to OMB.

15. *Id.* § 1, 65 Fed. Reg. at 67,249.

16. Master Plans, Integrated Cultural Resource Management Plans, Integrated Natural Resource Management Plans and Range Management Plans are the types of planning documents that might trigger compliance requirements.

17. Memorandum, The Secretary of Defense, to Secretaries of the Military Departments, et al., subject: American Indian and Alaska Native Policy (20 Oct. 1998), available at <http://www.aec.army.mil> (Homepage/Publications).

Environmental law specialists (ELS) should work with cultural resource managers and the designated Coordinator for Native American Affairs to identify federally recognized tribes affiliated with their installation, and land impacted by installation activities. Environmental law specialists can then assist in identifying installation plans and policies with the potential to impact tribal governments or tribal resources protected by law or treaty.¹⁹ Where development and implementation of installation plans and policies²⁰ may directly effect tribal governments or resources, ELSs should ensure that early tribal consultation occurs on a government to government basis in a manner consistent with Army policy and the principles discussed above. Mr. Farley.²¹

NEPA and Cumulative Impacts Analysis

Army environmental law practitioners should be well familiar with the requirements of the National Environmental Policy Act of 1969 (NEPA).²² Requirements involving the use of categorical exclusions,²³ and the merits of using an Environmental Assessment²⁴ or an Environmental Impact Statement²⁵ are generally well known and regularly applied by environmental lawyers. An area that can be overlooked in NEPA practice, however, is the analysis of the cumulative impacts of a federal action.²⁶ This section will highlight the area of cumulative impacts analysis under NEPA and provide an example of a scenario where the need for cumulative impacts analysis may not be readily apparent.

The Council on Environmental Quality (CEQ) defines cumulative impact as:

[T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.²⁷

Army Regulation 200-2 requires consideration of cumulative impacts at all levels of NEPA analysis. The screening criteria of *Appendix A* dictate that categorical exclusions may only be used if “[t]here are minimal or no individual or cumulative effects on the environment as a result of this action.”²⁸ Paragraph 5-2 states that “[a]n [Environmental Assessment] is required when the proposed action has the potential for . . . [c]umulative impact on environmental quality when combining effects of other actions or when the proposed action is of lengthy duration.”²⁹ The considerations above also apply to Environmental Impact Statements. In sum, cumulative impacts must be considered in the analysis of Army actions under NEPA.³⁰

Environmental attorneys must be cognizant of cumulative impacts in rendering advice on NEPA issues. Environmental Assessments and Environmental Impact Statements will include a section analyzing cumulative impacts. However, situations may arise where cumulative impacts might be overlooked. Consider a set of facts where there are several building projects on an Army installation either recently completed or where construction is ongoing. Assume that all of these

18. U.S. DEP'T OF ARMY, PAM. 200-4, CULTURAL RESOURCES MANAGEMENT, app. F (1 Oct. 1998), available at <http://www.aec.army.mil> (Homepage/Publications).

19. Protected tribal resources usually involve cultural resources such as those covered by the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2000) (burial of ancestral human remains), and the National Historic Preservation Act, 16 U.S.C. §§ 470-470x-6 (2000) (properties of traditional religious and cultural importance), or access to natural resources on traditional hunting areas guaranteed by treaty.

20. For example, an installation may develop a policy that restricts access to a site that is significant to a tribe for practice of traditional religion and culture.

21. Mr. Farley is an attorney with the Army Environmental Center's Office of Counsel.

22. 42 U.S.C. §§ 4321-4370 (2000).

23. See U.S. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS, paras. 4.0-.4, app. A (23 Dec. 1988) [hereinafter AR 200-2].

24. Council on Environmental Quality, Terminology and Index, 40 C.F.R. § 1508.9 (1999).

25. 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.11.

26. See 40 C.F.R. § 1508.7.

27. *Id.*

28. See AR 200-2, *supra* note 23, app. A-31(b).

29. *Id.* para. 5-1(a).

30. The methodology for examining the cumulative impacts of Army actions under NEPA is beyond the scope of this article. For those interested in the technical aspects of such analysis, see COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997), available at <http://www.ceq.eh.doe.gov/nepa/nepanet.gov>.

projects are in the same general area, within two or three miles of one another. Now consider a proposal for the construction of another building on the same installation and in the same general area. Assume further that the proposed building is relatively small and no extraordinary circumstances are raised by its plans. It might be understandable to conclude, after analyzing the environmental impacts of the project itself, that there would be no significant impact on the environment. However, it is important to include in the analysis the cumulative impacts of the project in conjunction with the “past, present, and reasonably foreseeable future actions in the area.”³¹ This would include all of the recent building projects and any other reasonably foreseeable actions to be taken in the area. The CEQ regulations require consideration of whether “a project’s environmental effects may be cumulatively significant in conjunction with other environmental conditions that are reasonably foreseeable, even if they are not significant by themselves.”³² Analysis of the direct and indirect environmental effects of the project along with analysis of the cumulative impacts could, of course, still result in a finding of no significant impact (FNSI),³³ but the cumulative impacts clearly must be considered.³⁴

Cumulative impact analysis raises a number of factual questions, such as: What geographic area should be considered in the analysis? What are foreseeable future actions? Is there a good baseline from which to base the analysis of cumulative impacts? The answers to these questions are rarely clear and

will depend upon the facts and conditions existing on and around the installation in question. What is clear is that a good faith attempt to analyze cumulative impacts is required for compliance with NEPA.

These facts also arguably raise the related but slightly different issue of the improper segmentation of projects. “Significance cannot be avoided by terming an action temporary or by breaking it down into small components.”³⁵ The courts have held that “agencies may not evade their responsibilities under NEPA by artificially dividing a major federal action into smaller components, each without ‘significant’ impact.”³⁶ Segmentation issues require analysis of the degree to which the actions are related and connected to each other. The CEQ regulations provide definitions and some factors to consider in making such determinations.³⁷ Under our facts above, it would have been ideal to analyze all of the building projects in a single NEPA document. However, this is not always possible as new projects are not always foreseeable. Assuming good faith on the part of the agency, our facts more properly raise the issue of cumulative impacts as opposed to segmentation.

The importance of a proper cumulative impacts analysis under NEPA cannot be overemphasized. Awareness of cumulative impacts issues is vital to compliance with NEPA and should be understood by the environmental attorney. This note provides the environmental practitioner with a starting point for

31. Council on Environmental Quality, Terminology and Index, 40 C.F.R. § 1508.7 (1999).

32. Roanoke River Basin Ass’n v. Hudson, 940 F.2d 58, 64 (4th Cir. 1991).

33. A finding of no significant impact (FNSI) means:

a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

40 C.F.R. § 1508.13.

34. See generally Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60 (D.C. Cir. 1987); Hudson, 940 F.2d 58.

35. 40 C.F.R. § 1508.27(b)(7).

36. Coalition on Sensible Transp., 826 F.2d at 68.

37. In the context of defining the scope of an action, “connected actions” are defined as those which are:

closely related and therefore should be discussed in the same impact statement. Actions are connected if they: (i) Automatically trigger other actions which may require environmental impact statements[;] (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously[;] (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. § 1508.25(a)(1). “Cumulative actions” are those “which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement. *Id.* § 1508.25(a)(2). “Similar actions” are those:

which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

Id. § 1508.25(a)(3).

spotting cumulative impacts issues and some basic references to begin legal research into this important issue. Major Tozzi.

Army Environmental Center Prepares Guidance on Fuel Tanker Trucks

The Army Environmental Center (AEC) is preparing compliance guidelines regarding fuel tanker trucks. In connection with this effort, AEC's Office of Counsel (OC) has prepared a legal analysis of some of the issues associated with the tanker trucks.³⁸ According to the opinion, if a fuel tanker truck leaves post (that is, it is not used exclusively within the confines of the installation), it is subject to Department of Transportation (DOT) spill regulations,³⁹ and not EPA's Spill Prevention Control and Countermeasures (SPCC) regulations.⁴⁰ On the other hand, if the tanker truck is used exclusively within the confines of the installation, and the other prerequisites for the SPCC regulations are met, the SPCC regulations would apply, and secondary containment is required unless it can be shown to be impracticable. The AEC legal opinion provides some recommendations as to Army policy for fuel tanker trucks, including tanker trucks used during training exercises. Most importantly, AEC OC recommends that secondary containment be avoided for tanker trucks used in connection with training exercises, either because it is not required or because it is impracticable. Other fuel tanker trucks that serve in more of a storage role should be protected with some form of secondary containment. Ms. Rathbun.

Litigation Division Note

Changes to the Federal Rules of Civil Procedure and Federal Rules of Evidence

Introduction

On 17 April 2000 the Supreme Court of the United States transmitted to Congress⁴¹ amendments to both the Federal Rules of Civil Procedure (FRCP)⁴² and Federal Rules of Evidence (FRE)⁴³ which took effect on 1 December 2000.⁴⁴ These amendments could have a significant impact on judge advocates in the field who compile discovery in Army civil lawsuits, prepare litigation reports for use by Litigation Division and Department of Justice (DOJ) attorneys, and advise federal officials who are sued for acts occurring in the performance of their official duties. The changes to the FREs will likely impact military criminal practice as they foreshadow commensurate future changes to the Military Rules of Evidence.⁴⁵ This article will discuss the changes to the FRCPs and FREs and their possible impact on military practice.

Amendments to the Federal Rules of Civil Procedure

The amendments to the FRCP focus primarily on the discovery process to expedite litigation, reduce costs of discovery, and allow for earlier and more extensive judicial intervention. The principle change makes the disclosure requirements universally mandatory by eliminating the local "opt out" provisions. Other significant changes appear in the scope of mandatory disclosure. The specific changes are discussed below.

38. Memorandum, Command Counsel, The Army Environmental Center, Office of Counsel, SFIM-AEC-JA, to Chief, Environmental Quality Division, ATTN: Mr. Michael Worsham, subject: Department of Transportation (DOT) Regulations for Fuel Tanker Trucks that Transport Oil (24 Oct. 2000), available at <http://www.jagc-net.army.mil> (Databases/Civil Law/Environmental Law/Clean Water Act).

39. DOT Oil Spill and Prevention Response Plans, 40 C.F.R. §§ 130.1-.33 (2000).

40. EPA Oil Pollution and Prevention, 40 C.F.R. §§ 112.1-.21.

41. See 28 U.S.C. § 2072 (2000) (conferring on the Supreme Court the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts and courts of appeals).

42. Amendments to the Federal Rules of Civil Procedure, Federal Rules of Evidence, Federal Rules of Criminal Procedure and Federal Rules of Bankruptcy Procedure, 192 F.R.D. 340-341 (2000) (adopted April 17, 2000, effective December 1, 2000, to be published at 529 U.S. 1157 (2000)) [hereinafter Amendments to the Federal Rules]. Included in the amendments to the FRCPs are changes to: Rule 4, Summons; Rule 5, Service of Process; Rule 12, Defenses and Objections; Rule 26, Disclosures; Rule 30, Depositions; and Rule 37, Sanctions.

43. *Id.* at 398-99 (to be published at 529 U.S. 1191 (2000)). The amendments to the FREs include changes to: Rule 103, Rulings on Evidence; Rule 404(a), Character Evidence; Rule 701, Opinion Testimony by Lay Witnesses; Rules 702 and 703, Testimony by Experts; Rule 803(6), Hearsay Exceptions and Rule 902, Self-Authentication.

44. *Id.* at 341, 398. The amendments to the FRCPs and FREs govern all proceedings in civil and criminal cases commenced after 1 December 2000 and, insofar as just and practicable, all proceedings in civil and criminal cases pending on that date. *Id.* at 341, 398-99.

45. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 1102 (2000) (stating that all amendments to the FREs shall apply to the Military Rules of Evidence (MRE) eighteen months after the effective date of the amendments unless the President takes action to the contrary).

Rule 4—Summons

Prior to amendment, FRCP 4 stated only that “[s]ervice upon an officer, agency, or corporation of the United States, shall be effected by serving” the United States and by sending a copy of the summons and complaint by registered or certified mail to the officer, agency, or corporation.⁴⁶ The rule was silent as to whether service on the United States was required if an officer or employee was sued in his individual capacity, and courts provided inconsistent guidance on this point.⁴⁷ As a result, the United States often did not learn of suits in a timely manner to the prejudice of both the United States and the named individual. The amendment now requires a party to serve the United States when an officer or employee of the United States is sued individually for “acts or omissions occurring in connection with the performance of duties on behalf of the United States – whether or not the officer or employee is sued also in an official capacity. . . .”⁴⁸ The rule also requires the court to allow a reasonable time to cure improper service or lack of service on the United States, “if the plaintiff has served an officer or employee of the United States sued in an individual capacity.”⁴⁹ In light of these changes, judge advocates should educate federal employees of the need to notify supervisors or legal offices if they are sued for activities that occurred in connection with their federal employment.

Rule 5—Service and Filing of Pleadings and Other Papers

As amended, FRCP 5 prohibits the filing of discovery materials “until they are used in a proceeding or the court orders filing.”⁵⁰ Before this amendment, filing of discovery materials

with the court was not uniform.⁵¹ Some jurisdictions, through local rules, opted for filing discovery with the court, while others did not.⁵² The amendment mandates uniformity in all jurisdictions. However, only the portions of the materials actually used in the proceedings need to be filed, although any party is free to file other pertinent portions of the materials and the court is free to order further filings.⁵³ Pretrial disclosures, however, still must be filed with the court as now provided in FRCP 26(a)(3).⁵⁴

Rule 12—Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings

The amendments to FRCP 12 relate to the changes to FRCP 4.⁵⁵ Officers and employees of the United States, whether sued in their official or individual capacities, now have sixty days after service to answer the complaint or the cross-claim, or to reply to a counterclaim,⁵⁶ as opposed to the twenty days provided for in the pre-amendment rule.⁵⁷ This change will give the United States more time to consider the officer or employee’s request for representation and to investigate the allegations in the complaint or counterclaim.⁵⁸ This provision may mean that the United States’ answer is due earlier than the officer or employee’s answer since the government’s response date will begin running when the United States Attorney’s office is served, which could occur before service on the officer or employee.

46. FED. R. CIV. P. 4(i)(2) (2000) (amended by FED. R. CIV. PROC. 4(i)(2)(A),(B) (2000)).

47. See, e.g., Vaccaro v. Dobre, 81 F.3d 854, 856-57 (9th Cir. 1996); Armstrong v. Sears, 33 F.3d 182, 185-87 (2d Cir. 1994); Ecclesiastical Order of the Ism of Am v. Chasin, 845 F.2d 113, 116 (6th Cir. 1988); Light v. Wolf, 816 F.2d 746 (D.C. Cir. 1987).

48. FED. R. CIV. P. 4(i)(2)(B).

49. *Id.* 4(i)(3)(B).

50. *Id.* 5(d).

51. See Amendments to the Federal Rules, *supra* note 42, at 381-82 (Committee Note to Rule 5 amendments).

52. *Id.*

53. *Id.* With the growing use of electronic filing, the restriction should help protect material covered by the Privacy Act, 12 U.S.C. §§ 3401-3422 (2000), although the issue of whether unfiled discovery is accessible by the public will undoubtedly be argued in the courts.

54. See *infra* notes 86-87 and accompanying text.

55. See *supra* notes 46-49 and accompanying text.

56. FED. R. CIV. P. 12(a)(3)(B) (2000).

57. *Id.* 12(a)(1)(A).

58. Amendments to the Federal Rules, *supra* note 42, at 364 (Committee Notes to Rule 12 amendments).

Rule 26—General Provisions Governing Discovery; Duty of Disclosure

Rule 26(a)(1)(A)&(B)

Rule 26(a) Required Disclosures: Methods to Discover Additional Matter

In response to widespread support for developing a nationally uniform initial disclosure rule,⁵⁹ the local opt out provisions of FRCP 26(a)(1) have been eliminated.⁶⁰ The old rule allowed local jurisdictions to use a variety of discovery procedures that were implemented as part of the Civil Justice Reform Act,⁶¹ with the expectation that allowing local systems to use their own specialized procedures would help refine the need for national uniformity and identify classes of cases in which the disclosure requirements were unnecessary.⁶² This goal was never achieved. The amended rule removes the authority to alter or opt out of the national initial disclosure requirements by either local rule or standing orders of individual courts or judges.⁶³ Judges still may issue case specific orders that alter or eliminate the initial disclosure requirements, and the parties still may stipulate to avoid initial disclosure.⁶⁴ Judges may not, however, issue standing orders altering the initial disclosure requirements.⁶⁵

The amendment to FRCP 26(a) eliminates the need to find and learn multiple local rules on initial discovery and should therefore make litigation report preparation easier. Still, judge advocates must be prepared to meet disclosure requirements in all cases.

In addition to providing for needed uniformity, the amendments to FRCP 26 also narrow the scope of the initial disclosure requirements.⁶⁶ The old rule required a party to disclose all information, whether favorable or unfavorable, whether it intended to use the information or not, so long as the information was relevant to the proceedings, as well as to disclose all witnesses and documents “relevant to disputed facts alleged with particularity in the pleadings.”⁶⁷ Now, parties must disclose only witnesses and documents “that the disclosing party may use to support its claims or defenses, unless solely for impeachment.”⁶⁸ “Use” includes use at a pretrial conference, to support a motion, or at trial; it also includes intended use in discovery, such as using a document to question a witness during a deposition.⁶⁹ Parties are no longer obligated to disclose witnesses or documents they do not intend to use.⁷⁰

Unchanged is FRCP 26(e)(1)’s requirement to supplement disclosures when additional information is later discovered. A party must therefore supplement its required disclosures when it determines that it may use a witness or document that it did not previously intend to use.⁷¹ Failure to supplement required disclosures is now a basis for FRCP 37 sanctions.⁷²

While Litigation Division and Department of Justice attorneys must ultimately decide issues of relevancy and whether or not evidence will be used, judge advocates who prepare litigation reports must continue to deliver all the discoverable evi-

59. See Amendments to the Federal Rules, *supra* note 42, at 384-85. (Committee Note to Rule 26 amendments, citing T. WILLGING ET AL., FEDERAL JUDICIAL CENTER, DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE (1997)).

60. The “opt out” provision refers to FRCP 26’s former disclosure requirement which permitted local rules directing that disclosure would not be required or that altered its operation. The opt out provision “reflected the strong opposition to initial disclosure felt in some districts, and permitted experimentation with differing disclosure rules in those districts that were favorable to disclosure.” *Id.* at 384.

61. 28 U.S.C. §§ 471-482 (2000).

62. See Amendments to the Federal Rules, *supra* note 42, at 384-85 (Committee Note to Rule 26 amendments).

63. *Id.* at 385.

64. FED. R. CIV. P. 26(a)(1); Amendments to the Federal Rules, *supra* note 42, at 385 (Committee Note to Rule 26 amendments).

65. Amendments to the Federal Rules, *supra* note 42, at 385.

66. *Id.*

67. FED. R. CIV. P. 26(a)(1)(A)-(B) (amended by FED. R. CIV. P. 26(a)(1)(A)-(B) (2000)).

68. FED. R. CIV. P. 26(a)(1)(A)-(B) (2000).

69. Amendments to the Federal Rules, *supra* note 42, at 385 (Committee Note to Rule 26 amendments).

70. *Id.* Note, however, that the disclosure obligation does extend to witnesses and documents that the party intends to use if “the need arises.” FED. R. CIV. P. 26(a)(3); Amendments to the Federal Rules, *supra* note 42, at 385.

71. Amendments to the Federal Rules, *supra* note 42, at 385 (Committee Note to Rule 26 amendments).

72. Rule 37 was amended to subject a party to sanctions for failure to amend discovery responses to interrogatories, requests for production or requests for admissions as required by FRCP 26(e)(2). FED. R. CIV. P. 37(c)(1).

dence in a case, and should identify that evidence particularly related to claims and defenses.

Rule 26(a)(1)(E)

In addition to narrowing the disclosures required under FRCP 26(a)(1)(A) and (B), FRCP 26 was also amended to exempt eight categories of cases from the initial disclosure requirements. The exempted categories are:

- (i) an action for review on an administrative record; (ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence; (iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision; (iv) an action to enforce or quash an administrative summons or subpoena; (v) an action by the United States to recover benefit payments; (vi) an action by the United States to collect on a student loan guaranteed by the United States; (vii) a proceeding ancillary to proceedings in other courts; and (viii) an action to enforce an arbitration award.⁷³

The Federal Judicial Committee exempted these eight categories because these cases generally require little, if any, discovery, or are cases in which initial disclosure would be unlikely to contribute to the effective development of the case.⁷⁴

The exempted categories are meant to be “generic” and “are intended to be administered by the parties—and, when needed, the courts—with the flexibility needed to adapt to gradual evolution in the types of proceedings that fall within these general categories.”⁷⁵ The eight categories are exclusive, however, and local rules or standing orders creating other general exemptions are invalid.⁷⁶ The Federal Judicial Center estimates that these

eight categories comprise approximately one-third of all civil filings.⁷⁷ Notwithstanding the exemption of these eight categories of proceedings from the disclosure requirements, judge advocates in the field should continue to forward all documentary evidence with litigation reports. While the documents may not be subject to initial disclosure requirements, the information may be needed for subsequent discovery requests and preparing litigation strategy.

The time for the initial disclosures now required under amended FRCP 26(a) is extended to fourteen days. The rule states that “unless a different time is set by stipulation or court order, or unless a party objects during the [FRCP 26(f)] conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan,” parties must make disclosures at the Rule 26(f) conference, or within fourteen days thereafter.⁷⁸ While the enlargement of time from ten to fourteen days will make it somewhat easier to meet the initial disclosure deadline, the DOJ recommended an enlargement to thirty days. Although on its face the rule provides more time for disclosure, it changes the way days are counted.⁷⁹ Consequently, the rule does not always result in an extended deadline. For example, under the old rule, a ten-day limit starting on 2 April 2001 would require that the disclosure be made no later than 16 April 2001.⁸⁰ However, under the new rule, a fourteen-day limit starting 2 April 2001, would require disclosure on the same day, 16 April 2001.

The disclosure date does not apply if a party objects to initial disclosure during the FRCP 26(f) conference and states its objection in the Rule 26(f) discovery plan.⁸¹ This provides a party an opportunity to raise objections to the court in cases where a party believes that disclosure would be “inappropriate in the circumstances of the action.”⁸² In a case where a party raises an objection to initial disclosure, the court must then rule on the objection and determine what disclosures, if any, should be made.⁸³ Disclosure is stayed until such time that the court rules on the objections raised. This minor change will have lit-

73. FED. R. CIV. P. 26(a)(1)(E).

74. See Amendments to the Federal Rules, *supra* note 42, at 386 (Committee Note to Rule 26 amendments).

75. *Id.*

76. *Id.* at 387.

77. *Id.* at 386.

78. FED. R. CIV. P. 26(a)(1).

79. *Id.* 6(a) (excluding intermediate Saturdays, Sundays, and legal holidays for deadlines less than eleven days).

80. Because the intermediate Saturdays, Sundays, and legal holidays are not excluded. See *id.* The new fourteen-day time limit seems only to lessen the burden of figuring out which days are excluded from a ten-day count.

81. FED. R. CIV. P. 26(a)(1).

82. *Id.*

83. *Id.*

tle impact on judge advocates. However, judge advocates should expeditiously forward all evidence for which disclosure is required.

Absent court order or stipulation, a new party added after the FRCP 26(f) conference has thirty days in which to make its initial disclosures.⁸⁴ However, “it is expected that later-added parties will ordinarily be treated the same as the original parties when the original parties have stipulated to forgo initial disclosure, or the court has ordered disclosure in a modified form.”⁸⁵ This change may allow only a limited time to respond in third-party actions.

As described above, the amendments to FRCP 5(d) remove the requirement to file disclosures under Rule 26(a)(1) and (2) until they are used in the proceeding. Under the new rule, FRCP 26(a)(4) simply provides that, unless the court orders differently, all disclosures under FRCP 26(a)(1) through (3) must be made in writing, signed, and served.⁸⁶ Additionally, the filing of pretrial disclosures under Rule 26(a)(4) is now required by Rule 26(a)(3). Pretrial disclosures must be provided to other parties and “promptly file[d] with the court.”⁸⁷ In order to ensure compliance with this change, judge advocates must provide all evidence available with the litigation report.

Rule 26(b) Discovery Scope and Limits

As amended, FRCP 26(b) limits discovery to “any matter, not privileged, that is relevant *to the claim or defense of any party*.”⁸⁸ Formerly, discovery extended as far as any matter “relevant *to the subject matter* involved in the pending action.”⁸⁹ Under the new rule, discovery may extend as far as matters “relevant to the subject matter involved in the action,”

only if ordered by the court “[f]or good cause.”⁹⁰ “The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery.”⁹¹

Although the amendments to FRCP 26(b) narrow the scope of discovery, they do not change the requirements of judge advocates preparing litigation reports. Litigation Division and DOJ still require any matter relevant to the subject of the pending litigation. Judge advocates must help identify information relevant to the claims or defenses of the parties.

The modifying word “relevant” has been added to the sentence in FRCP 26(b)(1) to clarify that information sought in discovery need not be admissible at trial if reasonably calculated to lead to the discovery of admissible evidence.⁹² The new rule now reads: “Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”⁹³ The word “relevant” was added to avoid the possibility that the sentence otherwise would be misinterpreted to undercut the amended rule’s newly added limitation on discovery to matters relevant to the parties’ claims or defenses.⁹⁴ Thus, “relevant” information is discoverable, meaning information within the scope of discovery as defined elsewhere in the subdivision, whether or not the information is admissible, so long as the information sought is reasonably calculated to lead to the discovery of admissible evidence.⁹⁵

The amended rule also states that “[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii),” which have not been altered.⁹⁶ “This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.”⁹⁷

84. *Id.*

85. Amendments to the Federal Rules, *supra* note 42, at 387 (Committee Note to Rule 26 amendments).

86. FED. R. CIV. P. 26(a)(4).

87. *Id.* 26(a)(3).

88. *Id.* 26(b)(1)(emphasis added).

89. FED. R. CIV. P. 26(b)(1) (amended by FED. R. CIV. P. 26(b)(1) (2000) (emphasis added)).

90. FED. R. CIV. P. 26(b)(1).

91. Amendments to the Federal Rules, *supra* note 42, at 389 (Committee Note to Rule 26 amendments).

92. *See id.* at 389-90.

93. FED. R. CIV. P. 26(b)(1).

94. Amendments to the Federal Rules, *supra* note 42, at 389-90 (Committee Note to Rule 26 amendments).

95. *Id.*

96. FED. R. CIV. P. 26(b)(1).

97. Amendments to the Federal Rules, *supra* note 42, at 389-90 (Committee Note to Rule 26 amendments).

The amendments to FRCP 26(b)(2) remove the ability of courts to implement local rules or standing orders that change presumptive limits on depositions and interrogatories, or the presumptive limit on the length of depositions under amended FRCP 30.⁹⁸ These discovery activities can still be modified by court order or agreement of the parties in a particular case.⁹⁹ Because there are no presumptive limits on the use of requests for admission, the new rule continues to allow courts to limit such requests by local rule.¹⁰⁰ The amended rule should standardize most discovery tools. Judge advocates, however, must continue to check local rules and seek additional limits on discovery as needed.

Rule 26(d) Timing and Sequence of Discovery

Like other provisions in FRCP 26, the amendments to FRCP 26(d) eliminate the opt-out provision for pre-amendment Rule 26(d). Courts no longer have the authority to issue local rules or standing orders that allow parties to begin discovery before the FRCP 26(f) conference.¹⁰¹ Thus, the discovery moratorium now applies to all categories of cases, unless ordered otherwise by the court in a particular case or agreed to by the parties, with the exception of the eight categories of cases that are exempt from initial disclosure under FRCP 26(a)(1)(E).¹⁰²

With regard to the eight categories of exempt proceedings, discovery can begin at any time. “Although there is no restriction on the commencement of discovery in these cases, it is not expected that this opportunity will often lead to abuse since there is likely to be little or no discovery in most such cases.”¹⁰³ Defendants can seek additional time to respond to discovery in exempted actions by bringing a motion under FRCP 26(c).¹⁰⁴ In cases that are in litigation, judge advocates should instruct

potential witnesses that plaintiffs’ attorneys have no authority to seek information or other discovery prior to the discovery conference.

Rule 26(f) Meeting of the Parties; Planning for Discovery

The amended rule removes the ability of courts to exempt cases from the FRCP 26(f) discovery planning conference requirement by local rule or standing order.¹⁰⁵ This change standardizes the requirement to have the parties confer about their discovery plans early in the litigation process. The eight categories of cases exempted from initial disclosure under FRCP 26(a)(1)(E), however, are also exempted from the requirement of the FRCP 26(f) conference.¹⁰⁶ All other categories of cases are subject to the requirement, although a court may order that the conference not occur in a particular case, or order that it *should* occur in a case exempted under FRCP 26(a)(1)(E).¹⁰⁷

The parties must now hold the FRCP 26(f) conference at least twenty-one days, instead of fourteen days, before the FRCP 16 scheduling conference or a FRCP 16(b) scheduling order is due.¹⁰⁸ Additionally, parties must submit to the court the written report outlining their discovery plan within fourteen days, instead of ten days, after the FRCP 26(f) conference.¹⁰⁹ These time periods may be shortened by local rule “[i]f necessary to comply with [a court’s] expedited schedule for Rule 16(b) conferences.”¹¹⁰ The court may also allow the parties to report orally on their discovery plan at the FRCP 16(b) conference in lieu of submitting a written plan.¹¹¹ The discovery conference need not be held face-to-face, although, in a particular case, “[a] court may order that the parties or attorneys attend the

98. *Id.* at 391.

99. *Id.*

100. *Id.*

101. *Id.* at 392.

102. *Id.*

103. *Id.* at 389 (Committee Note).

104. *Id.*

105. *Id.* at 392-93.

106. FED. R. CIV. P. 26(f) (2000).

107. Amendments to the Federal Rules, *supra* note 42, at 393 (Committee Note to Rule 26(f) amendments).

108. FED. R. CIV. P. 26(f).

109. *Id.*

110. *Id.*

111. *Id.*

conference in person.”¹¹² In light of these changes, extensions to provide litigation reports will be harder to obtain.

Rule 30—Depositions Upon Oral Examination

The amendments to FRCP 30 limit depositions to one day of seven hours unless otherwise authorized by the court¹¹³ or stipulated by the parties.¹¹⁴ Reasonable breaks for lunch or other reasons do not count for the seven-hour period.¹¹⁵ The deposition of each person designated under FRCP 30(b)(6) counts as a separate deposition for purposes of the time limit.¹¹⁶ Courts may no longer limit the time for depositions by local rule, although they may do so by order in particular cases.¹¹⁷

Rule 30(d)(1) now requires “[a]ny objection during a deposition,”¹¹⁸ as opposed to “[a]ny objection to evidence during a deposition,”¹¹⁹ to be stated concisely and in a non-argumentative, non-suggestive manner. Similarly, the witness may be instructed not to answer to enforce “a limitation directed by the court,”¹²⁰ as opposed to “a limitation on evidence directed by the court.”¹²¹ These changes are intended to avoid disputes about what constitutes “evidence,” and whether an objection is to, or a limitation is on, “evidence,” or merely discovery more broadly.¹²² The requirements of the rule thus “apply to any objection to a question or other issue arising during a deposition, and to any limitation imposed by the court in connection with a deposition.”¹²³ Based on these changes, unnecessarily

long depositions should cease. Agency counsel participating in depositions should have more leeway in raising objections to matters beyond “evidence.” Practitioners should note, however, that the standard for what is objectionable has not changed.

Consistent with the changes to Rule 5(d), the amendment to Rule 30(f)(1) deletes the requirement that deposition transcripts be filed with the court.¹²⁴

Rule 37—Failure to Make Disclosure or Cooperate in Discovery: Sanctions

The amendment to FRCP 37 adds the failure to supplement a prior discovery response¹²⁵ to the list of failures to disclose that, unless harmless, will prevent a party from using the non-disclosed information or witnesses or justify other court-imposed sanctions.¹²⁶ Department of the Army and DOJ litigation attorneys concerned about sanctions will want assurances that all discovery responses are complete and timely supplemented. All newly found information must be coordinated through the litigation attorneys as soon as possible. This will have a significant impact on agency counsel in the field who will be the primary providers of documents.

112. See Amendments to the Federal Rules, *supra* note 42, at 393 (Committee Note to Rule 26(f) amendments).

113. A party seeking a court order to extend the seven-hour time limit must show good cause. *Id.* at 395-96 (Committee Note to Rule 30 amendments). Factors for the court to consider when asked for an extension include whether the deposition will be prolonged because of the need for an interpreter, whether the deposition will cover events occurring over a long time period, whether the deponent’s own lawyer will want to examine the witness, and whether the deponent is an expert witness. *Id.* If multiple parties will need to examine the witness, additional time may be appropriate, although the examinations should not duplicate one another and parties with similar interests should try to designate one lawyer to ask questions about areas of common interest. *Id.*

114. *Id.* The parties and witnesses are expected to make reasonable accommodations to avoid the need for court intervention, and may agree to alter the deposition schedule to best suit their mutual convenience. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 396.

118. FED. R. CIV. P. 30(d)(1) (2000).

119. FED. R. CIV. P. 30(d)(1) (amended by FED. R. CIV. P. 30(d)(1) (2000)).

120. FED. R. CIV. P. 30(d)(1).

121. FED. R. CIV. P. 30(d)(1) (amended by FED. R. CIV. P. 30(d)(1) (2000)).

122. See Amendments to the Federal Rules, *supra* note 42, at 395 (Committee Note to Rule 30 amendments).

123. *Id.*

124. *Id.* at 396.

125. See FED. R. CIV. P. 26(e)(2) and discussion *supra* notes 71-72 and accompanying text.

126. FED. R. CIV. P. 37(c) (1).

Amendments to the Federal Rules of Evidence

As noted in the introduction, the proposed amendments to the FRE also became effective on 1 December 2000.¹²⁷ While the amendments will affect both civil and criminal cases in the Army, we will only address the impact on civil cases in this article.

Rule 103—Rulings on Evidence

A party that unsuccessfully objects to the admission or exclusion of evidence will no longer need to renew its objection at trial in order to preserve the issue on appeal.¹²⁸ Before the recent amendment, the requirement of renewing objections at trial varied among federal jurisdictions.¹²⁹ In an effort to establish uniformity, the amendment added a sentence at the end of FRE 103(a) which provides that, “[o]nce 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.”¹³⁰ An analysis of the term “definitive ruling” is key to determining whether counsel must renew its objection at trial. If counsel has any doubts as to whether or not the court has reserved judgment on the ruling, counsel has an obligation to clarify the issue with the court.¹³¹ However, even if the court makes a definitive advance ruling, the amendment does not preclude the court from reviewing its decision once a party offers the evidence.¹³² As the committee note highlights, “[i]f the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal.”¹³³ The same holds

true where the material facts and circumstances at trial differ from those proffered at the advance hearing.¹³⁴

The amendment to FRE 103(a) is not boundless. The amendment does not override FRCP 72(a)¹³⁵ and its requirement to appeal, in writing, any adverse evidentiary decisions of a federal magistrate within ten days of receiving a copy of the order.¹³⁶ One issue not addressed by the amendment to FRE 103(a) is whether a party who loses a motion in limine and who then offers the evidence in an attempt to minimize its prejudicial impact, waives the right to appeal the trial court’s ruling.¹³⁷ Litigation attorneys should maintain a checklist of prior objections in a case and note those on which the court has definitively ruled.

Rule 701—Opinion Testimony by Lay Witnesses

The amendment to Rule 701 adds an additional clause that prevents counsel from using lay witnesses to provide expert opinions. In its entirety, amended Rule 701 provides:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.¹³⁸

127. See *supra* notes 43-44 and accompanying text. With regard to FRE 404, Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes, the amendment to Rule 404(a)(1) expands the government’s ability to introduce evidence of the accused’s negative character in certain circumstances. The amendment inserts an additional clause at the end of Rule 404(a)(1), such that it now allows for evidence of a pertinent trait of character of an accused to be admitted if:

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 character of the accused offered by the prosecution . . .

FED. R. EVID. 404(a)(1) (2000) (emphasis added). Because this change only effects criminal cases, it will not be discussed in this article.

128. See Amendments to the Federal Rules, *supra* note 42, at 411-14 (Committee Note to Rule 103 amendments).

129. *Id.*

130. FED. R. EVID. 103(a).

131. See Amendments to the Federal Rules, *supra* note 42, at 412 (Committee Note to Rule 103 amendments).

132. *Id.* at 412.

133. *Id.*

134. *Id.*

135. FED. R. CIV. P. 72(a) (2000).

136. Amendments to the Federal Rules, *supra* note 42, at 413 (Committee Note to Rule 103 amendments).

137. *Id.* at 413-14.

Under the amendment, the true test of admissibility focuses on the nature of the testimony rather than the job title or description of the witness.¹³⁹ The court must examine testimony “under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”¹⁴⁰ Even with the amendment, it is possible for one witness to give both lay and expert testimony in the same case.¹⁴¹ As to those portions of a witness’s testimony qualifying as the latter, the amendment requires parties to lay the proper foundation under FRE 702.¹⁴² Furthermore, the amendment prevents a party from evading the disclosure requirements for expert witnesses set forth in FRCP 26.¹⁴³ As such, FRE 701(c) should limit the number of surprise experts disguised as lay witnesses.

Rule 702—Testimony by Experts

The amendment to FRE 702 is a response to recent cases addressing expert witness testimony.¹⁴⁴ As amended, the rule adds a new clause to the end that allows a witness to provide an expert opinion, “if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”¹⁴⁵

Recognizing that the circumstances surrounding each trial will differ, the amendment does not include procedural requirements instructing courts on how to exercise their gatekeeper function over expert testimony.¹⁴⁶ Instead, courts will likely continue to rely on the list of factors recognized in *Daubert* and later cases in assessing whether or not expert testimony is sufficiently reliable to be heard by the trier of fact.¹⁴⁷ As noted by

the Rules Committee, “[c]ourts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, it is contemplated that this will continue under the amended Rule.”¹⁴⁸ Thus, the trial court retains leeway in determining which opinion testimony meets the substantive requirements under the amended rule. This leaves considerable room for advocacy in addressing the issues of reliability. While proffered expert testimony need not rely upon scientific method, it must be properly grounded, reasoned, and explained according to an accepted body of learning or experience in the expert’s field.

Rule 703—Bases of Opinion Testimony by Experts

The presumption underlying the amendment to FRE 703 emphasizes the general notion that when an expert relies upon inadmissible information, such as hearsay, that information may not be brought before the trier of fact via the expert’s testimony.¹⁴⁹ The amended rule does so by stating that “[f]acts 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 probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”¹⁵⁰

In essence, the amendment created a reverse FRE 403¹⁵¹ balancing test. Under amended FRE 703, inadmissible evidence upon which the expert reasonably relies in formulating the expert opinion is barred unless the probative value outweighs the prejudicial effect.¹⁵² As the Rules Committee specifically states, “when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying informa-

138. FED. R. EVID. 701 (2000 amendment noted in italics).

139. Amendments to the Federal Rules, *supra* note 42, at 416-17 (Committee Note to Rule 701 amendments).

140. *Id.*

141. *Id.*

142. *See id.*

143. *Id.*

144. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999).

145. FED. R. EVID. 702 (2000).

146. Amendments to the Federal Rules, *supra* note 42, at 423 (Committee Note to Rule 702 amendments).

147. *Id.* at 418-19 (listing five non-exhaustive factors).

148. *Id.*

149. Amendments to the Federal Rules, *supra* note 42, at 424 (Committee Note to Rule 703 amendments).

150. FED. R. EVID. 703 (2000).

151. FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.”).

tion is not admissible simply because the opinion or inference is admitted.”¹⁵³

The amendment to FRE 703 addresses only the disclosure of the inadmissible information to the trier of fact. “The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert’s opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert.”¹⁵⁴ The language of the amended rule is limited to information offered by the proponent of the expert. Data or facts underlying the expert’s testimony may be offered by an adverse party on cross-examination, and such an attack may open the door allowing the proponent of the expert to disclose otherwise inadmissible information to the finder of fact in rebuttal.

Rule 803—Hearsay Exceptions; Availability of Declarant Immaterial and Rule 902—Self-Authentication

The amendment to FRE 803(6), Records of Regularly Conducted Activity, allows parties to meet the foundational requirements of the rule, “without the expense and inconvenience of producing time-consuming foundation witnesses.”¹⁵⁵ The amendment is a welcome change to the rule. Previously, courts required foundation witnesses to testify unless the parties agreed to a stipulation of expected testimony.¹⁵⁶

The amendment to FRE 902, Self-authentication, adds two subsections (11) and (12).¹⁵⁷ Rule 902(11) addresses certified domestic records of regularly conducted activity and provides for their self-authentication. Domestic records shall be self-authenticating where:

[t]he original or a duplicate of a domestic record of regularly conducted activity that

would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—

- (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
- (B) was kept in the course of the regularly conducted activity; and
- (C) was made by the regularly conducted activity as a regular practice.¹⁵⁸

Rule 902(12) addresses certified foreign records of regularly conducted activity.¹⁵⁹ The amendment uses language that mirrors FRE 902(11) and provides for self-authentication of foreign records.¹⁶⁰ However, the amendment regarding certified foreign records places an additional burden on the declarant. Regarding foreign records, “[t]he declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed.”¹⁶¹

If a party intends to offer a domestic record into evidence under Rule 902(11) or a foreign record under 902(12), the party must provide all adverse parties with written notice of that intention. Further, the offering party must make the record and the supporting declaration available for inspection far enough in advance to provide the adverse party with a fair opportunity to challenge both.¹⁶² Because of these requirements, judge advocates will need to obtain all documents and have them paginated and certified much earlier in the discovery process.

152. See Amendments to the Federal Rules, *supra* note 42, at 424-25 (Committee Note to Rule 703 amendments).

153. *Id.* at 424.

154. *Id.*

155. Amendments to the Federal Rules, *supra* note 42, at 426 (Committee Note to Rule 803 amendments).

156. *Id.*

157. FED. R. EVID. 902(11), (12).

158. *Id.* 902(11). To assist practitioners a sample declaration is provided at Appendix A.

159. *Id.* 902(12).

160. *Id.*

161. Amendments to the Federal Rules, *supra* note 42, at 427-28 (Committee Note to Rule 902 amendments).

162. FED. R. EVID. 902 (11), (12).

Conclusion

The changes to the FRCP and the FRE will have an immediate impact on federal civil litigation. Taken together, the amendments to both the FRCP and FRE should create more uniform practice in the federal courts. It remains to be seen

whether the discovery changes will serve their intended purposes to expedite litigation, reduce costs of discovery, and allow for earlier and more extensive judicial intervention. Major Amrein, Major King, Captain Ryan, and Captain McCoy.

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

NAME ,)
)
 Plaintiff)
)
 v.) Civil Action No.
)
 NAME ,)
)
 Defendant)

DECLARATION

1. I hereby certify that the document attached hereto consisting of _____ pages, is a true and exact copy of the _____ (e.g., the in-patient records of Jane Doe, regarding her hospitalization from ____ to ____), an official document in the custody of the _____.
2. The records attached hereto were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.
3. The records attached hereto were kept in the course of the regularly conducted activity at _____. (TAMC, etc.)
4. The records were made by the regularly conducted activity as a regular practice.
5. I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. § 1746. (Use this language if the declaration is executed within the United States. If executed outside the United States, use "I declare (or certify, verify, or state) under penalty of perjury under the laws of the _____ (country where declaration will be signed) that the foregoing is true and correct.

Executed on: _____

NAME
Duty position