

# The Impact of Federal Rule 26 Changes

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A forensic accountant is often engaged by an attorney in a litigation matter to assist a client in proving or defending a case. When engaged in a litigation matter, my firm is subject to both its own professional

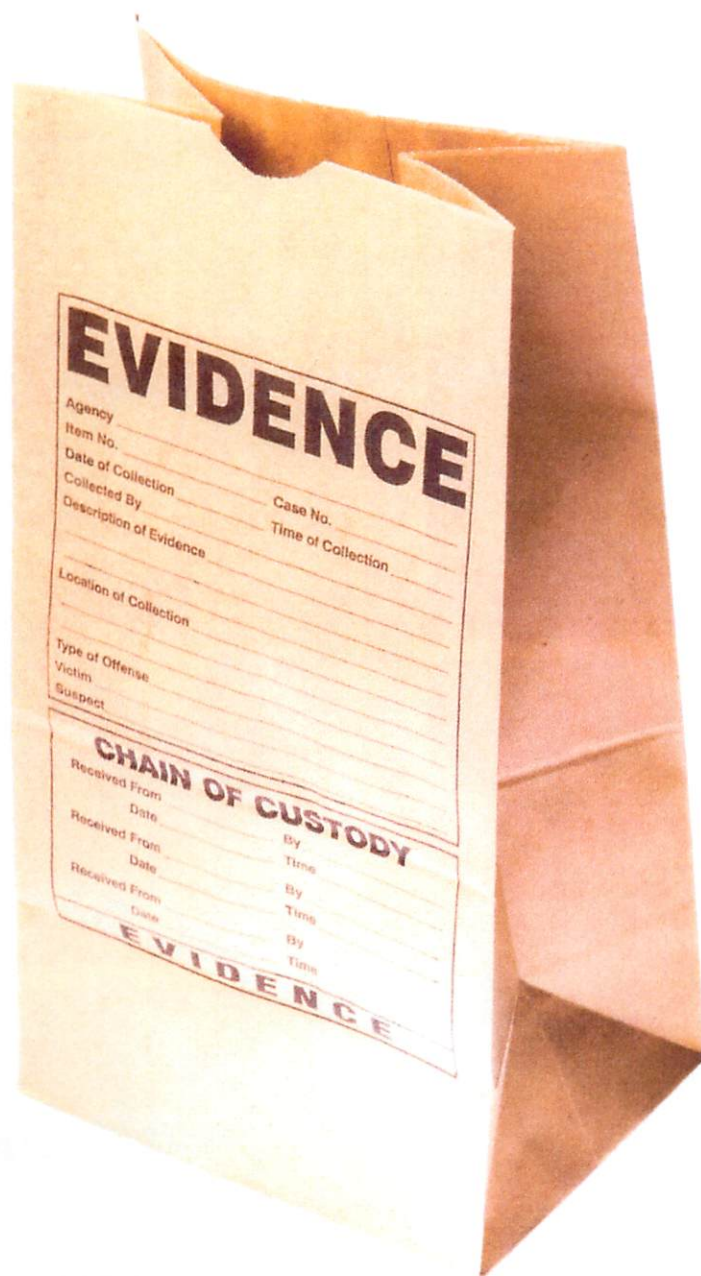
standards and the rules of civil procedure followed by the court in the jurisdiction in which the case was filed. For example, when a case is filed in federal court, its civil procedures apply.

One of the most relevant

Federal Rules of Civil Procedures for forensic accountants, as well as other experts, is Federal Rule of Civil Procedure 26 (Rule 26) which governs discovery matters and mandates the disclosure of certain facts

to the adversary. Because discovery rules differ, we are often engaged first as a non-testifying expert and later named as a testifying expert. A non-testifying expert's communications, notes and the like are not required to be turned over to the adversary, while a testifying expert's are, as amended by changes made in December 2010. These are the first such amendments to be put in place since 1993.

The 1993 amendments caused quite a dilemma for the testifying experts and attorneys working together on a case. These amendments required any communication, whether oral or written, be turned over to the adversary or deemed discoverable and not subject to work product protection rules, making it difficult for the expert and attorneys to openly discuss facts of the case. As a result, and to the detriment of the case, the expert and attorney limited their written and oral communication, and the expert prepared only one draft of his/her report. In some matters, to avoid disclosure under the work product privilege, counsel or his/her clients hire non-testifying experts to run different scenarios and calculations. Here, testifying experts are able to show attorneys a copy of their reports on a laptop or other device for review and editing without creating another draft.





The December 2010 amendments included limiting the discovery of draft reports, attorney-expert communications and changed the requirement that all “data and other information” be disclosed to “the facts or data considered by the witness” being disclosed to the adversary. The expectation was and is that these changes will streamline the discovery process when testifying experts are used during litigations. Not only will it eliminate unnecessary questioning at deposition, but it will also reduce associated costs. While Rule 26 changes include the protection of most communications between attorneys and experts and draft reports, certain information is still discoverable, including:

- The expert’s compensation arrangement.
- Information considered that was provided by counsel for whom he/she is working.
- Any assumptions used that were provided by counsel.

The modifications do not protect communications with third parties, such as other testifying experts. For example, when a forensic accountant relies on information provided by another testifying expert in formulating his/her opinion, he/she often speaks with the other expert. Beware, those discussions are

discoverable. If the forensic accountant is asked if he/she had any conversations by opposing counsel during the deposition, the forensic accountant will have to divulge the content. Had the conversations been with the attorney, they would be privileged and he/she would not be required to respond to the question.

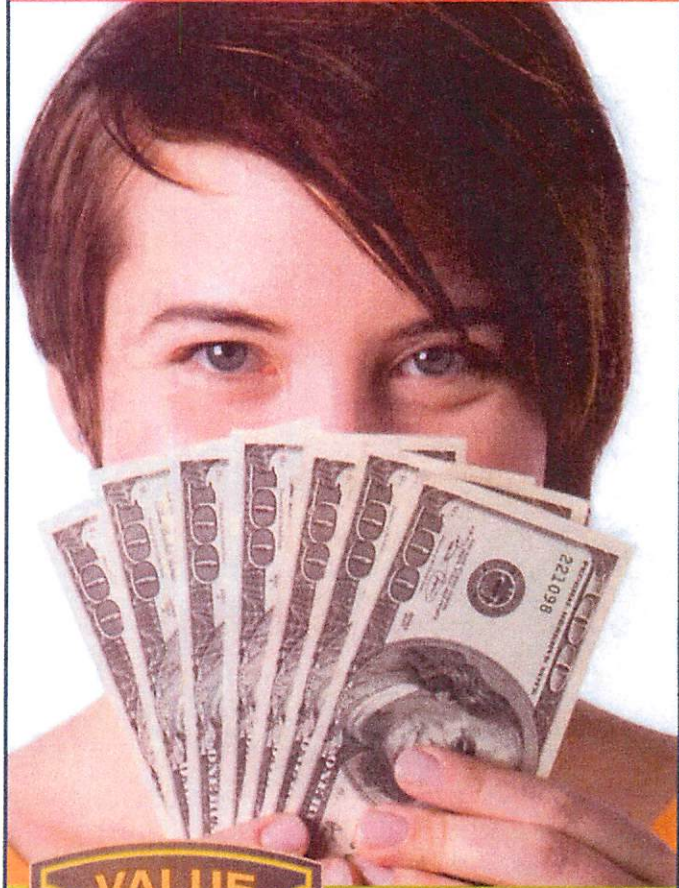
In its report to the Judicial Conference, the Committee on Rules of Practice and Procedure looked to New Jersey’s success after enacting its own rules prohibiting discovery of draft expert reports and limiting discovery of attorney-expert communications. The committee stated that it “obtained information from lawyers practicing on both sides of the ‘v’ and in a variety of subject areas about their experiences with it” and that “the New Jersey practitioners emphasized that discovery had improved.”

As a forensic accountant who has been engaged as a testifying expert in federal litigation matters, Rule 26 changes will make it easier to complete assignments without hindering a litigant’s rights to fair due process. It’s a win for all involved. ■

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