

FEDERAL RULES OF EVIDENCE CHANGE

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On December 1, 2010, key changes to the Federal Rules of Civil Procedure became effective. The most significant change from the perspective of forensic accountants and valuation experts is the change in expert witness discovery rules. These changes are both positive and practical from the point of view of the expert witness.

The changes made in the Federal Rules essentially extend work-product privilege to cover certain communications between the expert, even one named as a testifying expert witness, and the retaining attorney. As stated in the Civil Rules Committee Report - "The argument for extending work-product protection to some attorney-expert communications and to all drafts of Rule 26(a)(2) disclosures or reports is profoundly practical." Experienced experts will certainly agree with this assessment.

For many years the Federal Rules required experts to disclose draft reports and information regarding communications with the attorney who retained them if subpoenaed by the opposition. This has resulted in strategies such as not issuing draft reports and making no notes in meetings with attorneys. In depositions of expert witnesses there has often been a significant attempt by opposing counsel to uncover such client-expert communications. This process is both expensive for the client and an inefficient use of valuable deposition time which seldom provided material information.

As an even more expensive coping strategy, some attorneys took to hiring two experts for the same material: 1) a consulting expert to assist the attorney in providing case analysis, which may include rather candid discussions about the general strength of the case; and 2) a testifying expert who was insulated from anything other than raw data.

The new Federal Rules provide work-product privilege protections to include draft reports and most communications between the expert and the attorney. This extension of privilege will reduce the cost of litigation and make the process much more efficient.

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The specific language regarding the areas of work-product privilege is:

26(b)(4)(B) “*Trial Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.”

And,

26(b)(4)(C) “*Trial Preparation Protection for Communications Between a Party’s Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party’s attorney and any witness required to provide a report under Rule 26(a)(2)(B) regardless of the form of the communications, except to the extent that the communications:

- (i) Relate to compensation for the expert’s study or testimony;
- (ii) Identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) Identify assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.

Importantly, while these changes limit discovery of certain work performed by experts, they do not change the gatekeeper responsibilities of the court under Daubert. Ultimately, the court will remain the final decision maker regarding what evidence will be admitted in each case.

Effective Date: The effective date of these changes is December 1, 2010. That is, these rules automatically apply to cases filed in Federal Court starting December 1, 2010. These rules also may apply to cases filed prior to December 1, 2010, where such application is practical. Of course, prior to issuing any draft report, the expert should discuss this issue with counsel to make sure what rule is in effect for each specific case.

State Rules: Many, if not most, states have adopted the Federal Rules of Civil Procedure specifically as they relate to discovery of expert witnesses. Experts need to be aware that adoption of changes to the Federal Rules may not automatically apply in every state. So, the expert should discuss the rules of evidence with counsel when the case is in state court as the new Federal Rules may not be applicable.

Summary: The opinions expressed by an expert must be based on their experience and training applied to the evidence. Yet, communication with counsel is critical for development of a cost-effective work product. This includes preparation of a draft report for discussion with counsel. Such draft reports are not prepared for the purpose of allowing counsel to dictate the opinions to be rendered. They are prepared in order to make sure that the opinions expressed on the case are consistent with the law and that they are understandable to a non-expert. The new changes in the Federal Rules of Civil Procedure now recognize the interactive process that goes into the litigation process.

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