

PURSUANT TO RULE 27(f) OF THE MISSISSIPPI RULES OF APPELLATE PROCEDURE, THE RULES COMMITTEE ON CIVIL PRACTICE AND PROCEDURE SEEKS COMMENTS FROM THE BENCH, THE BAR AND THE PUBLIC ON THE PROPOSED AMENDMENT TO **RULE 4.04 of the Uniform Circuit and County Court Rules**

Comments should be filed with the Clerk of the Supreme Court, Gartin Justice Building, P.O. Box 249, Jackson, Mississippi 39205-0249.  
Deadline: **June 11, 2012.**

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IN THE SUPREME COURT OF MISSISSIPPI

IN RE: UNIFORM CIRCUIT AND COUNTY  
COURT RULES

RULES \_\_\_\_\_

**MOTION TO AMEND RULE 4.04 OF THE UNIFORM  
CIRCUIT AND COUNTY COURT RULES**

The Advisory Committee on Rules (“Committee”), at the request and approval of the Conference of Circuit Judges and the Conference of County Court Judges, recommends that the Court adopt an amendment to Rule 4.04 of the Uniform Circuit and County Court Rules to address discovery issues/considerations pertaining to electronically stored information (“ESI”). In support thereof, the Committee would show unto the Court the following:

1.

Given the advancement of technology and its ever increasing presence in litigation, in September of 2011, the Committee filed motions recommending certain amendments to Rules 16 and 26 of the Mississippi Rules of Civil Procedure. A number of the proposed amendments address ESI. The proposed amendments to Rules 16 and 26 of the Mississippi Rules of Civil Procedure were circulated among the members of the

Conferences of Circuit and County Court Judges for their input and suggestions. More and more, disputes in discovery are prompted primarily by the use of ESI in today's electronic world which complicate the litigation process. In an effort to avoid unacceptable delays and prohibitive expense, the following amendment is proposed to U.C.C.C.R. 4.04 (which would enhance and compliment proposed amendment Rule 26(b)(5) to the Mississippi Rules of Civil Procedure<sup>1</sup>):

**C. When the attorneys and any unrepresented parties confer as required by Miss. R. Civ. P. 16(a) in order to draft an Agreed Scheduling Order, the attorneys and any unrepresented parties should discuss the following topics relating to the discovery of electronically stored information (“ESI”):**

- (1) The format and media to be used in the production of ESI;**
- (2) Steps the parties will take to identify and preserve discoverable and reasonably accessible EIS to avoid a claim of spoliation;**
- (3) The scope of discoverable ESI to be preserved by the parties;**
- (4) How to handle inadvertent disclosure of privileged or Miss. R. Civ. P. 26(b)(3)-protected ESI;**

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<sup>1</sup> Proposed Amendment to MRCP 26(b)(5): *Specific Limitations on Discovery of Electronically Stored Information*. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the concerns of Rule 26(d)(2). The court may specify conditions for the discovery. Such conditions may include: (i) limiting the frequency or extent of electronic discovery; (ii) requiring the discovery to be conducted in stages with progressive showings by the requesting party of a need for additional information; (iii) limiting the sources of electronically stored information to be accessed or searched; (iv) limiting the amount or type of electronically stored information to be produced; (v) modifying the form in which the electronically stored information is to be produced; (vi) requiring a sample production of some of the electronically stored information to determine whether additional production is warranted; and (vii) allocating to the requesting party some or all of the cost of producing electronically stored information that is not reasonably accessible because of undue burden or cost.

- (5) Whether any categories of discoverable ESI are from sources that are not reasonably accessible and the basis for that contention;
- (6) Whether a party intends to seek discovery from sources identified as not reasonably accessible, and if so: (i) the burden and cost of assessing and retrieving such ESI; (ii) the putative good cause for requiring production of all or part of such ESI; and (iii) whether any limiting conditions such as those set forth in Miss. R. Civ. P. 26(b)(5), including cost allocation, are appropriate to reduce the cost of burden of producing ESI that is not reasonably accessible.

2.

The proposed amendment, which would be cited as U.C.C.C.R. 4.04D, would assist the bench, bar, and parties to litigation in understanding the feasibility, reasonableness, costs and benefits of various aspects of electronic discovery in the litigation process.

3.

A copy of the proposed amendment is attached as Exhibit 1 hereto.

WHEREFORE, PREMISES CONSIDERED, the Committee respectfully requests that the Court consider the proposed amendment to Rule 4.04 of the Uniform Circuit and County Court Rules and requests an opportunity, if it pleases the Court, to meet with the Court to discuss the proposed amendment as well as those amendments proposed in the Motions to Amend Rules 16 and 26 of the Mississippi Rules of Civil Procedure now pending before the Court pertaining to the discovery of electronically stored information.

Respectfully submitted, this, the 21<sup>st</sup> day of November, A.D., 2011.

MISSISSIPPI SUPREME COURT  
ADVISORY COMMITTEE ON RULES

BY: \_\_\_\_\_

COLETTE A. OLDMIXON, Chair

**UNIFORM CIRCUIT AND COUNTY COURT RULES**

**Rule 4.04. Discovery Deadlines & Practice**

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**D. When the attorneys and any unrepresented parties confer as required by Miss. R. Civ. P. 16(a) in order to draft an Agreed Scheduling Order, the attorneys and any unrepresented parties should discuss the following topics relating to the discovery of electronically stored information (“ESI”):**

- (1) The format and media to be used in the production of ESI;**
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- (3) The scope of discoverable ESI to be preserved by the parties;**
- (4) How to handle inadvertent disclosure of privileged or Miss. R. Civ. P. 26(b)(3)-protected ESI;**
- (5) Whether any categories of discoverable ESI are from sources that are not reasonably accessible and the basis for that contention;**
- (6) Whether a party intends to seek discovery from sources identified as not reasonably accessible, and if so: (i) the burden and cost of assessing and retrieving such ESI; (ii) the putative good cause for requiring production of all or part of such ESI; and (iii) whether any limiting conditions such as those set forth in Miss. R. Civ. P. 26(b)(5), including cost allocation, are appropriate to reduce the cost of burden of producing ESI that is not reasonably accessible.**

**EXHIBIT 1**