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May 23, 2016

Rules Committee on Civil Practice and Procedure
Supreme Court of Mississippi
Post Office Box 249
Jackson, Mississippi 39205

Re: M.R.C.P. Revision Project

To the Committee:

Thank you for extending your deadline for submitting proposed changes to the Mississippi Rules of Civil Procedure. The following suggestions arise from my practice experience. They are my own suggestions, and should not be attributed to my law firm or my colleagues.

First, a general suggestion: the Federal Rules of Civil Procedure have been amended to change most time periods to units of seven days, removing the need for moving a deadline back because it falls on a weekend, and generally making time easier to compute. I would suggest that our rules follow this federal example.

Rule 4. The federal courts have shortened the time limit for service to 90 days. There certainly are times when a defendant is difficult to serve, but in those cases, the plaintiff should have no problem showing good cause for additional time. Four months is a long time, and three months should be more than enough for diligent plaintiffs absent unusual circumstances.

Rule 13. I suggest amending the rule to spell out that, where an amended complaint requires an answer, there is no need to re-plead an already-pleaded counterclaim in the amended answer, unless the amended complaint makes it necessary to do so. Parties should not lose their counterclaims over such a procedural nicety.

Rule 26. Subsection (b)(1) limits discovery to what is "relevant to the issues raised," and goes on to say that inadmissibility is no bar to obtaining discovery. I am all too able to attest that many parties, and trial courts, treat the inadmissibility provision as applying to

JACKSON | RIDGELAND
600 Concourse, Suite 100
1076 Highland Colony Parkway
Ridgeland, Mississippi 39157

P.O. Box 6020
Ridgeland, MS 39158

Tel (601) 856-7200
Fax (601) 856-7626

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www.copelandcook.com

relevance (irrelevant evidence not being admissible), thus reading "relevant to the issues raised" right out of the rule. I suggest changing the last sentence of Subsection (b)(1) to say "will be inadmissible at trial (on grounds other than relevance)." Parties have no business seeking irrelevant discovery.

The federal Rule 26(b)(1) has recently been amended to require that discovery be limited to matters that are both relevant and "proportional to the needs of the case," going on to list certain factors. I think this proposal has great merit, but I can also see the wisdom of waiting to see how it shakes out in federal practice over the next two or three years. It may be easier to address proportionality through Rule 26(c)(1), which could be amended to allow a protective order against "undue *or disproportionate* burden or expense."

This Committee should look also to the federal Rule 26(b)(4)(B–C), which protects draft expert reports and many communications between experts and attorneys. Similar protections would be helpful in our own rules, especially given the effects of electronic drafting and messaging on the proliferation of such drafts and communications, which have swelled the scope of otherwise discoverable material beyond what likely existed when the rules were first enacted. (The Mississippi Association for Justice has made a similar proposal.)

Rule 29. We should follow the federal rule as amended and remove the requirement that the parties obtain consent of the trial court for mutually agreed extensions of time under Rule 33, 34, and 36. As the Mississippi Association for Justice has already and correctly observed, parties in Mississippi are already saving the trial courts a good deal of trouble by quietly disregarding these provisions.

Rule 45. The rule allows at least ten days for compliance with a subpoena duces tecum, but provides no such protection for persons subpoenaed to testify. (It does require "a reasonable time to comply," but that is subjective at best.) This has created problems where a party requires appearance in a day or two, overriding not only calendar conflicts but any opportunity to object to the subpoena (as for instance under Rule 26(b). It is not, unfortunately, always the case that parties and their counsel reach out in advance to arrive at an agreeable date, and abusive subpoenas of irrelevant witnesses are indeed a reality. I suggest that the ten days applicable to subpoenas for production also apply to subpoenas for deposition testimony.

Also, I endorse the suggestion already made by many attorneys to follow the federal practice and allow attorneys to issue subpoenas.

Rule 56. Subsection (c) allows the opposing party to "serve" affidavits the day before the hearing. This allows parties to drop affidavits in the mail the day before (service being

complete upon mailing), so that they are received only after the hearing (and, if the opponent is lucky, at the hearing itself). I suggest changing the language to require service in a manner that ensures actual, demonstrable receipt (hand delivery, e-mail with return receipt, fax).

Subsection (h) says that the trial court "shall award to the prevailing party the reasonable expenses incurred in attending the hearing of the motion." This rule is so routinely ignored by the trial courts that it should be dropped, lest it lend an air of unreality to the rules in general. It would seem to make more sense to give the trial court discretion to award expenses and/or attorney fees to the prevailing party on *any* motion brought "without reasonable cause," and move this provision to Rule 7 or to Rule 11. Better yet, because "without reasonable cause" is indistinguishable from "frivolously," eliminate this subsection altogether and let Rule 11 and the Litigation Accountability Act take care of any problem with unreasonable motions.

Rule 58. An issue pending before this Court is whether a written order takes effect before it is filed as of record with the clerk. Whatever that outcome, Rule 58 should be amended to expressly provide that orders (other than those issued from the bench and on the record), like judgments, are effective only when entered.

Rule 78. It would help expedite litigation if non-dispositive motions were decided on the briefs without a hearing, except where the trial court chooses to grant a hearing. I suggest that non-dispositive motions should be decided within 45 days of the reply memo's being timely filed. (There may be something to be said for moving U.R.C.C.C. 4.03's oft-ignored deadlines here, changing them to 14 days for responses and 7 days for replies.)

Also, although this falls under M.R.A.P. 15, the idea that parties should tattletale on judges who let motions sit too long is an impractical one. No one wants to bell the cat. After MEC is general in the trial courts, the electronic system should be modified to report to AOC all pending motions that have sat over 45 days, with automatic notices to the trial courts warning of trouble to come from above if the motions are not ruled upon within 14 days.

Thank you, and best wishes on your important project.

Sincerely yours,

Andy Lowry

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