215 FIFTH STREET NORTH
POST OFFICE BOX 1366
COLUMBUS, MISSISSIPPI 39703-1366
(662) 328-2316
FACSIMILE (662) 328-8035

1216 VAN BUREN
POST OFFICE BOX 947
OXFORD, MISSISSIPPI 38655
(662) 234-4845
FACSIMILE (662) 234-9071

JOHN WHEELER
EMAIL: jwheeler@mitchellmcnutt.com
Licensed in Mississippi and Tennessee

MITCHELL MCNUTT
SINCE 1904
POST OFFICE BOX 7120
TUPELO, MISSISSIPPI 38802-7120
105 SOUTH FRONT STREET
TUPELO, MISSISSIPPI 38804
(662) 842-3871
FACSIMILE (662) 842-8450

200 JEFFERSON AVENUE
SUITE 920
MEMPHIS, TENNESSEE 38103
(901) 527-2585
FACSIMILE (901) 527-2361

200 SOUTH MONTGOMERY STREET
SUITE 202 - 203
STARKVILLE, MS 39759
(662) 270-6283
FACSIMILE (662) 842-8450

October 30, 2023

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SUPREME COURT
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Mississippi Supreme Court
Rules Committee on Civil Practice and Procedure
c/o Clerk of Appellate Courts
P.O. Box 249
Jackson, Mississippi 39205

Re: Public Comments: Proposed Amendments to Rule 26 of the *Mississippi Rules of Civil Procedure*

Dear Supreme Court Rules Committee:

I have been involved in the defense of civil litigation matters in Mississippi courts for over 30 years. I send this letter in response to the proposed amendments to Rule 26 of the *Mississippi Rules of Civil Procedure.* To avoid redundancy, I join in the objections and comments offered by my colleague, Matthew D. Miller, Esq., in his attached October 13 correspondence to the Committee. As noted in Mr. Miller's correspondence, the distinctions between the existing federal Rule 26 and the proposed amendment to Mississippi Rule 26 are not immaterial. Typically, the proprietary of rebuttal evidence is a discretionary *evidentiary* judgment exercised by a trial court and not a matter of discovery. The proposed amendments to Mississippi Rule 26 appear to countenance gamesmanship in the expert discovery process by plaintiffs. Expert discovery is already arduous and expensive. The proposed amendments will likely make these challenges worse and are, at best, unnecessary and, at worst, unfairly prejudicial to civil defendants. I appreciate your consideration of this correspondence.

Very truly yours,

John Wheeler

JGW/trt
Attachment

Attachment 2:
MOTION# 2018-2403

40061435v1

COPELAND
COOK
TAYLOR &
BUSH

October 13, 2023

VIA U.S. FIRST-CLASS MAIL, POSTAGE PREPAID
Mississippi Supreme Court
Rules Committee on Civil Practice and Procedure
c/o Clerk of Appellate Courts
Post Office Box 249
Jackson, Mississippi 39205

Re: Public Comments: Proposed Amendments to Miss. R. Civ. P. 26

Dear Supreme Court Rules Committee:

Please accept this letter as my response and comments regarding the proposed amendments to Rule 26 of the Mississippi Rules of Civil Procedure, which were posted for public comment on September 28, 2023. Although I believe most civil defense attorneys share my concerns, my comments are mine alone and do not necessarily represent the opinions of any other attorney.

I believe the proposed amendments to Rule 26, as written, are at best unnecessary and at worst unfairly prejudicial to the defense bar.

Rule 26 already provides for mandatory supplementation of a party's prior discovery responses, including the party's expert witnesses and their opinions. *See* Miss. R. Civ. P. 26(f)(1)-(2). As such, in the absence of a scheduling order, Rule 26 already requires timely supplementation of a ***prior-designated*** expert's opinions, which would include rebuttal opinions. If the proposed amendments to Rule 26 seek only to require that, then the amendments are unnecessary.

However, the proposed amendments to Rule 26, as written, can be read another, far more dangerous way. The amendments could give plaintiffs unfettered freedom to disclose entirely new opinions regarding different subject matter, or even designate entirely new expert witnesses with new opinions and subject matter. If the proposed amendments are read that way, then they will unfairly prejudice the defense bar.

The plaintiff will designate her expert, disclose only the expert's minimal initial opinions, and wait for the defendant to designate its experts and disclose their opinions. Then, the plaintiff will be allowed to disclose entirely new, so-called "rebuttal" opinions regarding different subject matter and/or designate totally different, so-called "rebuttal" expert witnesses, without the defense having any opportunity to combat those new experts and new opinions.

The proposed amendments to the Advisory Committee Notes to Rule 26 appear to prohibit such practice. But unlike the federal rule, there is no language in the text of the Mississippi Rule itself (or in the proposed amendments to the text of the Rule) to indicate this prohibition.

Federal Rule 26 expressly defines rebuttal expert opinions as those that are "intended solely to contradict or rebut evidence ***on the same subject matter*** identified by another party under Rule 26(a)(2)(B) or (C)." Fed. R. Civ. P. 26(a)(2)(D)(ii) (***emphasis*** added). Given this language, the federal courts have held that the Rule "allows for a rebuttal report by an expert so long as the report is intended solely to contradict or rebut evidence ***on the same subject matter*** identified in an expert report served by another party." *White v. State Bd. of Election Comm'rs*, 2023 U.S. Dist. LEXIS 65692, *11 (N.D. Miss. Apr. 14, 2023) (***emphasis*** added).

Regarding designating a totally new expert witness, the federal courts have held that, "only when the defendant's expert raises ***new issues*** in his report that were not raised in the plaintiff's expert's report and the plaintiff must call ***a new expert*** to rebut that information is there a need for a rebuttal expert designation." *Midwest Feeders, Inc. v. Bank of Franklin*, 2016 U.S. Dist. LEXIS 100219, *3 (S.D. Miss. July 29, 2016) (citation omitted) (***emphasis*** added) (cleaned up).

Regarding supplementation of expert opinions, the federal rule states that "any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due." Fed. R. Civ. P. 26(e)(2). Given this language, the federal courts have held that Rule 26(e)(2) only allows ***supplemental*** expert reports "to present 'additions or changes' to expert information ***that do not constitute 'material additions to the initial report.'***" *Id.* (internal citations omitted) (***emphasis*** added) (cleaned up).

Just like the federal rule, Mississippi Rule 26 should clearly state – in the text of the Rule itself – that "rebuttal" expert opinions are permitted only if they are "intended solely to contradict or rebut evidence ***on the same subject matter*** identified by another party's expert."

Further, like the federal rule and the caselaw interpreting it, the Advisory Committee Notes to Mississippi Rule 26 should clearly state that:

a. A plaintiff may not designate a new witness as a rebuttal expert unless the defendant's expert raises new issues that were not raised by the plaintiff's initial experts and the plaintiff needs a different expert to rebut that new information; and
b. A party may only disclose supplemental expert opinions that present additions or changes that do not constitute material additions to the initial opinions.

In short, I believe the amendments to Mississippi Rule 26 should mirror the language of the federal rule and federal case-law regarding rebuttal experts. Therefore, I suggest that the amendments should read like the enclosed proposal.

I hope this letter provides you with sufficient information to understand and evaluate my concerns regarding the proposed amendments to Rule 26. If you should require any further information, please do not hesitate to contact me.

Thank you in advance for your time and attention to this matter.

With kindest regards, I remain . . .

Sincerely,

MATTHEW D. MILLER

MDM/mmm
Enclosure

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; and requests for admission. Unless the court orders otherwise under subdivisions (c) or (d) of this rule, the frequency of use of these methods is not limited.

(b) Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party. The discovery may include the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things; and the identity and location of persons (i) having knowledge of any discoverable matter or (ii) who may be called as witnesses at the trial. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial preparation: materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including that party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of that party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is: (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial preparations: experts. Discovery of facts known and opinions held by experts, otherwise discoverable under subsection (b)(1) of this rule may be obtained only as follows:

(A) (i) A requesting party may, through interrogatories, require any other party to identify any witness whom the responding party expects to call as a witness at trial to present evidence under Mississippi Rule of Evidence 702, 703, or 705.

(ii) If such witness has been retained or specially employed to provide expert testimony, the requesting party may, through interrogatories, require the responding party to state the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the facts or data considered by the witness in forming the opinions, regardless of when and how the facts or data were made known to the witness; any exhibits that will be used to summarize or support the opinions; the witness's qualifications, including a list of all publications authored by the witness in the previous ten years; a list of cases in which, during the previous ten years, the witness testified as an expert at trial or by deposition; and, for retained experts, a statement of the compensation to be paid for the study and testimony in the case.

(iii) If such witness has not been retained or specially employed to provide expert testimony, the requesting party may, through interrogatories, require the responding party to state the subject matter on which the witness is expected to present evidence under Mississippi Rule of Evidence 702, 703, or 705; and a summary of the facts and opinions to which the witness is expected to testify.

(iv) Absent a stipulation or a court order, all expert disclosures must be made at least 60 days before the date set for trial. However, if an expert disclosure is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(b)(4)(A)(i)-(iii), it must be made within 30 days after the other party's disclosure.

~~(iv)~~ A party may depose any person who has been identified as a witness who will present evidence at trial under Mississippi Rule of Evidence 702, 703, or 705. Such expert depositions shall not be taken until the party desiring to depose such expert has received interrogatory responses concerning such expert's expected testimony.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Rule 26(b)(3) protects drafts of any interrogatory responses required under Rule 26(b)(4)(A)(ii) or other expert disclosures regardless of the form in which the draft is recorded.

(D) Rule 26(b)(3) protects communications between the party's lawyer or representative of the lawyer and any expert witness who has been retained or specially employed to present evidence at trial under Mississippi Rules of Evidence 702, 703 or 705, 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 upon in forming the opinions to be expressed. For purposes of this rule, a "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.

(E) Unless manifest injustice would result, the court shall require the party taking the deposition of an opposing party's expert who has been specially retained or employed to present expert testimony at trial to pay the expert a reasonable fee for time spent giving deposition

testimony and a reasonable fee for up to two hours actually spent preparing for such deposition. With respect to discovery obtained under subsection (b)(4)(B) of this rule, the court shall require the party seeking discovery: (i) to pay the expert a reasonable fee for time spent in responding to such discovery; and (ii) to pay the party who retained or specially employed the expert a fair portion of the fees and expenses reasonably incurred by such party in obtaining the facts and opinions from the expert.

(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; (vii) 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.

(6) Claiming privilege or protecting trial-preparation materials.

(A) Information withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, electronically stored information, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Discovery conference. At any time after the commencement of the action, the court may hold a conference on the subject of discovery, and shall do so if requested by any party. The request for discovery conference shall certify that counsel has conferred, or made reasonable effort to confer, with opposing counsel concerning the matters set forth in the request, and shall include:

1. a statement of the issues to be tried;
2. a plan and schedule of discovery;
3. limitations to be placed on discovery, if any; and
4. other proposed orders with respect to discovery.

Any objections or additions to the items contained in the request shall be served and filed no later than ten days after service of the request.

Following the discovery conference, the court shall enter an order fixing the issues; establishing a plan and schedule of discovery; setting limitations upon discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the case.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

The court may impose sanctions for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan by agreement. Upon a showing of good cause, any order entered pursuant to this subdivision may be altered or amended.

(d) Protective orders.

(1) In general. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending, or in the case of a deposition the court that issued a subpoena therefor, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

(A) that the discovery not be had;

(B) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(C) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(D) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(E) that discovery be conducted with no one present except persons designated by the court;

(F) that a deposition after being sealed is to be opened only by order of the court;

(G) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(H) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(I) that payment of some or all of the expenses attendant upon such deposition or other discovery device be made by the party seeking same.

(2) Limiting discovery. In determining whether to enter an order limiting the frequency or extent of discovery, the court may consider, among other things, whether the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less

burdensome or less expensive; whether the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; and whether the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving those issues.

(3) Ordering discovery. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

(4) Awarding expenses. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

(c) Sequence and timing of discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(f) Supplementation of responses.

(1) In general. A party who has made an expert disclosure or who has responded to an interrogatory, request for production, or request for admission must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) Expert witness. With respect to any expert witness who has been retained or specially employed to present evidence at trial under Mississippi Rules of Evidence 702, 703, or 705, the party's duty to supplement in a timely manner extends to information included in any disclosure of that expert's expected testimony, including information given in response to an expert interrogatory, information provided in an initial or rebuttal expert disclosure, and information given during an expert's deposition.

(g) Signing discovery requests, responses, and objections. A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(1) Signature required: effect of signature. Every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name – or by the party personally, if unrepresented – and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry, with respect to a discovery request, response, or objection, it is:

(A) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(B) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(C) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to sign. Other parties have no duty to act on an unsigned request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) Sanction for improper certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Advisory Committee Notes

Rule 26(b)(2) limits discovery to "any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party." Earlier precedent authorized discovery of any matter, not privileged, relevant to the "subject matter" of the case. The current rule limiting discovery to the issues raised by any claim or defense was intended to narrow the scope of discovery.

Rule 26(b)(4)(A) establishes a two-tiered procedure for discovery concerning witnesses who will provide expert testimony at trial. With respect to retained and specially employed expert witnesses who are expected to testify at trial, the rule authorizes more detailed interrogatories than those permitted concerning other expert witnesses expected to testify at trial because a party can expect retained and specially employed expert witnesses to fully cooperate during discovery and trial. Thus, the rule authorizes interrogatories requesting not only a statement of the opinions the expert is expected to offer and the basis and reasons therefore, but also a statement of the facts and data considered, not just those relied upon, by the expert as well as information concerning the witness's qualifications, publications and previous expert testimony. Although Rule 26(b)(4)(A)(ii) authorizes interrogatories concerning exhibits that will be used to support or illustrate a retained or specially employed expert witness's opinion expected to be offered at trial, a complete response to such an interrogatory may not be possible until closer to trial because some such exhibits may not be created until they are actually needed for trial. Thus, a response or supplemented response concerning such exhibits should not be deemed untimely if it was reasonably made in advance of trial. Rule 26(b)(26)(b)(4)(A)(iii) establishes a more limited scope for interrogatories concerning expert witnesses who were not retained or specially employed but who are expected to testify at trial. Treating physicians and public accident investigators will often offer expert testimony at trial even though they have not been retained or specially employed by a party. The more limited duty to respond to interrogatories concerning this category of experts is based upon the recognition that some such witnesses may not fully cooperate with the party who intends to call them at trial thereby making it difficult or impossible for the party intending to call such witness at trial to fully and adequately respond to interrogatories requesting the more detailed information that is discoverable with respect to retained or specially employed expert witnesses expected to testify at trial. A response under Rule 26(b)(26)(b)(4)(A)(iii) is sufficient if it gives reasonable notice of the expert's testimony, taking into account the limitations of the party's knowledge of the facts known by and the opinions held by the expert.

Rule 26(b)(4)(A)(iv) provides that all expert disclosures must be made at least 60 days prior to trial (*see* UCCCR 4.03), but rebuttal expert disclosures must be made within 30 days after the other party's expert disclosure that it is intended to rebut. Rebuttal expert opinions serve a different purpose than a party's initial disclosure of expected expert testimony. Rebuttal opinions are allowed only if they are intended solely to contradict or rebut evidence on the same subject matter identified by another party's expert disclosure. They are not an opportunity to correct oversights in the party's initial disclosure. Expert

opinions regarding elements on which the disclosing party has the burden of proof may not be disclosed for the first time as rebuttal opinions. Rebuttal opinions may not simply buttress the disclosing party's case-in-chief with new evidence; rebuttal opinions must explain, repel, counteract, or disprove expert opinions disclosed by the opposing party. Rebuttal opinions may criticize the methodology used by the opposing expert or raise alternative analyses or relevant facts the opposing party's expert failed to consider. The rebuttal opinion may not advance new arguments, new theories, or new evidence, or address new subject matter outside the scope of the opposing expert's testimony. A plaintiff may not designate a new witness as a rebuttal expert unless the defendant's expert raises new issues that were not raised by the plaintiff's initial experts and the plaintiff needs a different expert to rebut that new information.

Rule 26(b)(4)(C) & (D) grant trial preparation material or "work product" protection to draft responses to expert interrogatories, drafts of expert disclosures, and certain communications between the lawyer and the expert (or between the representative of the lawyer and the expert) in an effort to avoid costly, and oftentimes inefficient, discovery and to encourage more open and robust communication between the attorney and expert so that the attorney and expert may come to a better mutual understanding of the case. The protection is not absolute. Discovery may be had in the three excepted areas. In addition, pursuant to Rule 26(b)(3), a party may overcome the trial preparation material protection by showing a substantial need for the material in preparation of the case and an inability to obtain the substantial equivalent without undue hardship. The protection is not meant to foreclose inquiry into whether the expert explored other theories in the case at hand; whether the expert has ever explored other theories that were not explored in the case at hand, and if so why such theories were not explored in the case at hand; whether the expert considered any facts which were not relied upon and, if so, why such facts were not relied upon; whether any tests were run or models developed other than those disclosed in interrogatory responses and the results of such tests and/or models; and whether anybody other than the party's attorney provided support or participation in framing the opinion.

Rule 26(b)(5) governs discovery of electronically stored information and provides that a party may initially refuse to produce electronically stored information from a source that is not reasonably accessible because of undue burden or cost. The rule further provides, however, that a court may grant a motion to compel discovery from such sources upon a showing of good cause after taking into account factors such as the burden, expense and likely benefit of such discovery. The rule explicitly authorizes a court to order the requesting party to pay for some or all of the costs associated with discovery of electronically stored information from a source that is not reasonably accessible.

Rule 26(b)(6) requires a party withholding information based on a claim of privilege or trial preparation material to generally describe such information so as to enable the requesting party to assess the claim. It also establishes a procedure to govern inadvertent disclosure of privileged or trial preparation material.

Rule 26(c) authorizes the court to hold a discovery conference and thereafter enter an order governing discovery. The rule grants the court discretion to limit discovery and to allocate some or all of the expense of discovery to the requesting party when appropriate.

Rule 26(d) grants a court discretion to enter a protective order, among other things, prohibiting or limiting discovery after considering factors such as burden, cost, and likely benefit of such discovery.

Rule 26(f) imposes a duty to supplement. The duty to supplement, while imposed on a party, applies whether the additional or corrective information is learned by the client or by the attorney. Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. It may be useful for any scheduling order to specify the time or times when supplementations should be

made. The obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to retained or specially employed experts, changes in the opinions expressed by the expert, whether in response to an interrogatory, an expert disclosure, or a deposition, are subject to a duty of supplemental disclosure. However, a party may only disclose supplemental expert opinions that present additions or changes that do not constitute material additions to the initial opinions. The obligation to supplement applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term "response" includes answers to interrogatories and to requests to admit as well as responses to production requests.

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. Although the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.

The duty to make a "reasonable inquiry" is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11. In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances. Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances.

Rule 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand. Thus, the lawyer's certification under Rule 26(g) ~~[sic]~~ should be distinguished from the requirement that a responding party must sign interrogatory responses under oath pursuant to M.R.C.P. 33(b).

Nor does the rule require a party or an attorney to disclose privileged communications or work product in order to show that a discovery request, response, or objection is substantially justified. The signing requirement means that every discovery request, response, or objection should be grounded on a theory that is reasonable under the precedents or a good faith belief as to what should be the law. This standard is heavily dependent on the circumstances of each case. The certification speaks as of the time it is made. The duty to supplement discovery responses continues to be governed by M.R.C.P. 26(e).

The premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor. The rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of Rule 26(g). The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular

circumstances. The sanctioning process must comport with due process requirements. The kind of notice and hearing required will depend on the facts of the case and the severity of the sanction being considered. To prevent the proliferation of the sanction procedure and to avoid multiple hearings, discovery in any sanction proceeding normally should be permitted only when it is clearly required by the interests of justice. In most cases the court will be aware of the circumstances and only a brief hearing should be necessary.

END.

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MITCHELL MCNUTT & SAMS, P.A.
ATTORNEYS AT LAW
P.O. BOX 7120
TUPELO, MISSISSIPPI 38802-7120

TO:
Mississippi Supreme Court
Rules Committee on Civil Practice & Procedure
c/o Clerk of Appellate Courts
P.O. Box 249
Jackson, Mississippi 39205