IN THE SUPREME COURT OF MISSISSIPPI

IN RE: UNIFORM RULES OF CIRCUIT AND COUNTY COURT PRACTICE

UNIFORM CHANCERY COURT RULES

RULES _____

MOTION TO AMEND CERTAIN UNIFORM RULES

The Advisory Committee on Rules ("Committee") recommends that the Court adopt amendments to certain rules of court practice; specifically Rule 4.04 of the Uniform Rules of Circuit and County Court Practice and the corresponding Rule 1.01 of the Uniform Chancery Court Rules. This recommendation is based upon the reality that discovery for all practical purposes cannot be completed in the ninety days contemplated by these Rules and that in the area of expert testimony the trial court should have the opportunity to fulfill it's gate-keeping responsibility under *Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 US. 579 (1993)* prior to trial. The proposed amendment to the Chancery Court Rule acknowledges by comment the limited applicability to the time sensitive matters in Rule 81 of the Mississippi Rules of Civil Procedure.

SUBSTANCE OF THE PROPOSED RULE CHANGES

A. Rule 4.04 Uniform Rules of Circuit and County Court Practice.

First, the proposed amendments extend the time for discovery from ninety (90) days to one hundred eighty (180) days. The rule acknowledges that this time limit can be varied by a scheduling order or by entry of an agreed order.

Second, :the proposed amendment includes anew provision relating to expert witnesses. The timing of *Daubert* issue resolution has had no guidance by rule resulting in the uncertainty of the admissability of an expert's testimony sometimes until the eve of trial. The proposed amendment allows either party or the Court, no later that thirty (30) days before trial to request a determination of the admissibility of an expert's testimony. Also, the ruling Court shall issue a definitive ruling with findings of fact and conclusions of law to support the ruling, admitting or excluding the testimony at least ten (10) days prior to trial unless the Court determines the issue is better considered at trial.

Third, comments are proposed to elaborate that this rule is in keeping with the Court's authority to coordinate a plan of orderly discovery and control the course of litigation in the Courts. The proposed comment further clarifies that the presumptive exclusion of a non-disclosed expert is premised on a previous discovery request or required disclosure by virtue of a scheduling order. Finally, the proposed amendment to the comment adds a discussion of the cost effectiveness of pre-trial determination of *Daubert* issues, and makes clear that the trial court has the discretion to defer the issue for resolution at trial if the circumstances warrant, and that a party can bring a *Daubert* challenge when the testimony is offered at trial.

B. Uniform Chancery Court Rule 1.01

Uniform Chancery Court Rule 1.01 is the counterpart in Chancery practice to Rule 4.04 of the Uniform Rules of Circuit and County Court Practice. The proposed amendments and comments are the same with one exception. The comment states, "Generally, absent a scheduling order the process of a Rule 1.10 will not apply to matters not governed by MRCP 81(d)."

The Committee respectfiffly request that the Court consider the allowed proposed

amendments to the Uniform Rules of Circuit and Chancery Court Practice. Attached to this petition are copies of the Proposed Amendments for the Courts review.

Respectfully submitted:

Mississippi Supreme Court
Advisory Committee on Rules

By: Edward E. Patten, jr,

Date: August 13, 2009

Set out below are proposed revisions to. URCCC 4.04. This draft reflects diScussions by the Subcommittee to date

The revisions address two issues: the deadline for discovery (in section A), and pre-trial hearings regarding the admissibility of challenged expert testimony (in Section B). New language is underlined; language to be deleted is stlielien-through. A proposed Comment is entirely new.

RULE 4.04 DISCOVERY DEADLINES AND PRACTICE

A. Discovery Deadlines Generally. Unless otherwise set forth in a scheduling order entered by the court, aAll discovery must be completed within ninety one hundred eighty days from service of an answer by the applicable defendant. Additional discovery time may be allowed by agreed order or with leave of court upon written motion setting forth good cause for the extension.

B. Experts. Unless otherwise set forth in a scheduling order entered by the court:

1. Designation of Expert Witnesses. Absent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty days before trial.

2. Pre-trial Determination of Admissibility of Expert Testimony. No later than thirty days before trial, on motion of any party or on its own motion. the court may order the question of the admissibility under MRE 702 of the testimony of any designated expert witness be submitted for pre-trial determination. The court shall issue its ruling at least ten days before trial, unless the court determines the particular issue of admissibility is better considered at trial Any definitive ruling excluding or admitting testimony shall set forth findings of fact and conclusions of law in support thereof,

11-C. Discovery Responses; Form. When responding to discovery requests, interrogatories, requests for production, and requests for admission, the responding party shall, as part of the responses, set forth immediately preceding the response the question or request to which such response is given. Responses shall not be deemed to have been served without compliance to this subdivision.

G-D. Motions to Compel. No motion to compel shall be heard unless the moving party shall incorporate in the motion a certificate that movant has conferred in good faith with the opposing attorney in an effort to resolve the dispute and has been unable to do so. Motions to compel shall quote verbatim each contested request, the specific objection to the request, the grounds for the objection and the reasons supporting the motion.

Comment

Rules 4.04(A) and (B) establish key deadlines that govern in the absence of a scheduling order entered by the court. This is in keeping with the court's authority to "establisha a plan and schedule of discovery," MRCP 26, and "control the course of the action." MRCP 16,

Rule 4.04(B) addresses two issues specific to expert testimony. To enable parties to prepare their cases adequately. Rule 4.04(B)(1) presumptively disallows the testimony of any expert who was not designated at least sixty days in advance of trial. A violation of Rule 4.04(B), however, must be premised on an underlying duty to identify expert witnesses. by virtue of. either a scheduling order entered by the court or a discovery request made pursuant to MRCP 26(b)(4). *See City offackson v. Perry*, 764 So.2d 373.384 (Miss. 2000).

In addition.. Rule 4.04(B)(2) facilitates cost-effective case management by providing a mechanism for pre-trial determination of *Daubert* challenges. *See* MRE 702. While trial courts retain significant latitude in crafting the manner of proceeding. an *in &nine* hearing is usually the best practice, given the complex factual inquiry required by *Daubert.* Indeed, courts must take care "not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility." *Cortex-Iritany v. Corporation Insular De Sways,* 111 F.3d 184. 188 (1" Cir. 1997), Still, "a full-scale *Daubed* hearing" is not essential when defects are obvious on the face of a proffer. *Edmonds v. State,* 955 So,2d 787. 792 (Miss. 2007) (citations omitted). *See also Smith v. Clement,* No. 2006-CA-00018SCT (Miss. 2008). At bottom, parties are entitled to an opportunity to be heard that adequately embraces the complexity of the particular issues. Because cases vary, courts retain the discretion to defer the issue for resolution at trial if the circumstances warrant Nothing in Rule 4.04(B)(2) requires a party to bring a *Daubert* challenge before the testimony is offered at trial.

Set out below are proposed revisiOns to UCCR 1.10. This draft reflects .discussions by the Subcommittee to date.

The revisions address two issues the deadline for discovery (in section A), and pre-trial hearings regarding the admissibility of challenged expert testimony (in section 13). New language is underlined; language to be deleted is stricken-through. A proposed Comment is entirely new.

RULE 1.10 DISCOVERY DEADLINES AND PRACTICE

A. Discovery Deadlines Generally. Unless otherwise set forth in a scheduling order entered :by the court, All discovery must be completed within ninety one hundred eighty days from service of an answer by the applicable defendant. Additional discovery time may be allowed by agreed order or with -leave of court upon written motion setting forth good cause for the extension.

B. Experts. Unless otherwise set forth in a scheduling order entered by the court:

1. Designation of Expert Witnesses. Absent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty days before trial.

2. Pre-trial Determination of Admissibility of Expert Testimony. No later than thirty days before trial, on motion of any party or on its own:motion, the court may order the question of the admissibility under MRE 702 of the testimony of any designated expert witness be submitted for pre-trial determination. The court shall issue its ruling at least ten days before trial, unless the court determines the particular issue of admissibility is better considered at trial. Any definitive ruling excluding or admitting testimony shall set forth findings of fact and conclusions of law in support thereof.

Discovery Responses; Form. When responding to discovery requests, interrogatories, requests for production, and requests for admission, the responding party shall, as part of the responses, set forth immediately preceding the response the question or request to which such response is given. Responses shall not be deemed to have been served without compliance to this subdivision.

GrD. Motions to Compel. No motion to compel shall be heard unless the moving party shall incorporate in the motion a certificate that movant has conferred in good faith with the opposing attorney in an effort to resolve the dispute and has been unable to do so. Motions to compel shall quote verbatim each contested request, the specific objection to the request, the grounds for the objection and the reasons supporting the motion.

Comment

Rules 1.10(A) and (B) establish key deadlines that govern in the absence of a scheduling order entered by the court. This is in **keeping** with the court's authority to "establish(' a plan and schedule of discovery," **MRCP** 26, and "control the course **of the action,"** MRCP 16.

Rule .1.10(B) addresses two issues specific to expert testimony. To enable parties to prepare their cases adequately, Rule 1.10(B)(1) presumptively disallows the testimony of any expert who was not designated at least sixty days in advance of trial. **A violation of Rule 1.10(B),** however, must be premised on an underlying duty to identify expert witnesses, by virtue of either a scheduling order entered by the court or a discovery request made pursuant to MRCP 26(b)(4). *See City of Jackson v. Perry*, 764 So.2d 373, 384 (Miss. 2000).

In:addition, Rule 1.10(3)(2) facilitates cost-effective case management by providing a mechanism for pre-trial determination of *Dada-rt* challenges. *See* MRE 702. While trial courts retain significant latitude in crafting the mariner of proceeding, an *in lfrnine* hearing is usually the best practice, given the complex factual inquiry required by *Daulxn*. Indeed, courts must take care not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility," *Cortec Irizany 12 Corporation Insular De Seguros*, 111 F.3d 184, 188 (1" Cir. 1997). Still, "a full-scale *Daubert* hearing" is not essential when defects are obvious on the face of a proffer. *&kends v. State*, 955 So.2d 787. 792 (Miss. 2007) (citations omitted), *See also Smith v. Clement*, No. 2006-CA-00018SCT (Miss. 2008). At bottom, parties are entitled to an opportunity to be heard that adequately embraces the complexity of the particular issues. Because cases vary, courts retain the discretion to defer the issue for resolution at trial if the circumstances warrant. Nothing in Rule 1.10(B)(2) requires a party to bring a *Daulxii* challenge before the testimony is offered at trial.

Generally, absent a scheduling order the provisions of Rule 1.10 will not apply to matters governed by MRCP 81(d).