

November 13, 2018

Comments on Proposed Amendments to Miss. R. App. P. 26**Via Hand Delivery**

Honorable Chief Justice William L. Waller, Jr.
 Chief Justice, Supreme Court of Mississippi
 Gartin Justice Building
 450 High Street
 Jackson, MS 39201

FILED

NOV 13 2018

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**Via Hand Delivery**

Honorable Muriel Ellis
 Clerk of Appellate Courts
 Gartin Justice Building
 450 High Street
 Jackson, MS 39201

MOTION# 2018-2403

Re: Comments on Proposed Amendments to Miss. R. App. P. 26

Dear Chief Justice Waller and Ms. Ellis:

I am writing the Court on behalf of Butler Snow LLP to provide comments on the proposed amendments to Miss. R. App. P. 26.¹ The Firm applauds the Rules Committee's attempt to improve Rule 26 and we write in full support of the Committee's proposed amendments. Below are our thoughts on several of the provisions.

1. Electronically Stored Information (ESI).

The Committee's proposed new Rule 26(b)(5) makes it clear that the production of ESI as part of the normal discovery process is the default rather than requiring the requesting party to specifically request such information. Most newly-created information exists as ESI rather than in hard copy or other formats, and these changes to the Rule recognize this fact. We believe that the Committee has struck a balance between facilitating the accessibility of this information while at the same time protecting the producing party from unreasonable or unnecessary costs or other burdens.

¹ These comments are offered on behalf of the Firm and its attorneys. They are not intended to necessarily represent the views of all of the Firm's clients.

Via Hand Delivery

Honorable Chief Justice William L. Waller, Jr.

Via Hand Delivery

Honorable Muriel Ellis

November 13, 2018

Page 2

2. Discovery Pertaining to Expert Witnesses.

We fully support the Committee's efforts to allow for easier and more transparent discovery of expert opinions. While we believe that the production of an expert report should be required as per the Federal Rules of Civil Procedure, and these amendments greatly bridge the gap. Additionally, the amendments to Rule 26(b)(4)(A)(ii) allow for a more thorough investigation of the expert's opinions, background, and compensation.

The proposed amendments to Rule 26(b)(4)(C) and 26(b)(4)(D) grant certain protections from discovery with respect to communications between counsel and an expert witness. They also protect draft expert reports from disclosure. Currently, no such protection is specifically afforded under the Rules. As the Committee notes, we believe that these amendments will "avoid costly and inefficient discovery and encourage more open and robust communication between the attorney and expert so that the attorney and expert may come to a better understanding of the case." Put differently, the ends of justice are met where there is full and frank communication between an attorney and an expert.

Finally, with respect to discovery of expert opinions, we also support the amendment to Rule 26(b)(4)(A)(4) to specifically allow depositions of expert witnesses as a matter of course. Under the current version of the Rule, such a request must be made to the trial court, and the court has the discretion to grant or deny the request. Allowing depositions of expert witnesses as the default will promote consistency among cases and allow for full and complete expert discovery.

3. Logging of Privileged Information and Protection of Inadvertently Produced Privileged Information.

The proposed Rule 26(b)(6) requires a producing party making a claim of privilege to: (1) make the claim expressly; and (2) describe the information in a manner that, while protecting the privilege, will provide sufficient information to allow the requesting party to evaluate the claim of privilege and, if necessary, challenge the claim. This is a welcome addition as it will prohibit boilerplate

Via Hand Delivery

Honorable Chief Justice William L. Waller, Jr.

Via Hand Delivery

Honorable Muriel Ellis

November 13, 2018

Page 3

objections based on privilege and will allow a full and complete assessment of whether the information is, in fact, privileged. We believe that this mechanism affords the needed the protection of privileged information while at the same time allowing for more transparency.

The Committee's changes also provide that where privileged information is inadvertently produced, such production does not constitute a draconian waiver of the privilege. Instead, once the receiving party is notified, the information must be sequestered or returned until such time as the trial court can make a determination as to the claim of privilege. Importantly, if the information is returned to the producing party, the Rule requires that the information be preserved until the claim of privilege is resolved. We believe that the production of documents and ESI will be more efficient where there is no fear of inadvertent waiver.

4. Supplementation of Responses.

The Committee's amendments to Rule 26(f) bolster a party's obligation to seasonably supplement its discovery responses. Under the current version of the Rule, a party is "under no duty" to supplement its responses unless certain conditions are met. However, the new Rule makes supplementation the default. In addition, the new language of Rule 26(f)(2) specifically requires the supplementation of expert witness information where appropriate. Litigation is dynamic and these changes ensure that information continues to be accurate under changing conditions and circumstances.

We sincerely thank the Rules Committee for its work on the amendments to Rule 26 and we hope that our comments are helpful. If I can provide any additional information, please let me know.

Via Hand Delivery

Honorable Chief Justice William L. Waller, Jr.

Via Hand Delivery

Honorable Muriel Ellis

November 13, 2018

Page 4

Thank you for your consideration.

Respectfully submitted,

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