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Justice for All

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January 30, 2015

Mississippi Supreme Court
Kathy Gillis, Clerk of Court
P.O. Box 117
Jackson, Mississippi 39205-0117

Justice Jess H. Dickinson
Presiding Justice
Mississippi Supreme Court
P.O. Box 117
Jackson, Mississippi 39205-0117

RE: Mississippi Rules of Civil Procedure Revision Project

Dear Ms. Gillis and Justice Dickinson:

The Mississippi Association for Justice submits the attached proposed comments in response to the Court's September 30, 2015, letter soliciting proposals regarding possible revision of the Mississippi Rules of Civil Procedure.

Thank you for your consideration of this matter.

Respectfully submitted,

Dan Kitchens/ Phy

DAN KITCHENS, President
Mississippi Association for Justice

MISSISSIPPI ASSOCIATION FOR JUSTICE's SUBMISSION REGARDING MISSISSIPPI RULES OF CIVIL PROCEDURE REVISION PROJECT

Rule 1 Scope of Rules

The last sentence of the current rule should be amended to mirror the new FRCP 1:

> "[These Rules] should be construed, *administered, and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding."

This proposal mirrors the federal rule amendment effective December 1, 2015. The Federal Advisory Committee's explanation of the change is equally applicable to Mississippi state courts:

> Rule 1 is amended to emphasize that just as the court should construe and consider these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.
>
> This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules.

Rule 16 Pre-Trial Procedure

MAJ supports the adoption of the current proposal pending as to Rule 16, whose comment submission deadline was May 15, 2015. That proposal, which provides a deadline for entry of a scheduling order and for deadlines similar to those in use by the federal courts, would assist in timely resolution of litigation. Presently, in some districts it is very difficult to obtain a trial date, and in other districts, the parties are required to agree that all discovery is complete before a trial date can be obtained. Failure of agreement leads to delay.

Rule 23 Class Actions

Mississippi's lack of a class action procedure results in many cases which would be better heard in a Mississippi state court being litigated elsewhere, at much greater cost of litigation for Mississippi consumers, or in a federal court, if the jurisdictional amount can be met. Smaller claims may not meet the federal minimum jurisdictional amount, depriving many Mississippi citizens of a viable forum for their smaller, usually contract-based, claims. The Court should consider adoption of a class action rule similar to the federal rule.

Rule 26 General Provisions Concerning Discovery

Expert Reports

Discovery disputes regarding expert disclosures, draft expert reports, draft interrogatory responses, and materials reviewed by experts consume a great deal of the parties' and courts' time. It is recommended that Rule 26 be amended to add the following two paragraphs:

> Rule 26(b)(3) protects drafts of any interrogatory responses or reports required under this rule regardless of the form in which the draft is recorded.
>
> Rule 26(b)(3) protects communications between the party's attorney 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 relied upon 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.

These amendments would greatly clarify what information must be disclosed and what is not subject to disclosure. This rule allows the parties to consult freely with retained experts without concern that the attorneys' mental thought processes would be subject to disclosure if discussed with an expert. Expert consultations should not be limited due to concern that communications before experts' formulation of a final opinion will be subject to disclosure. Experts are most helpful to the litigation process when they can be consulted as a case unfolds, discovery develops, and research is done before arriving at a final opinion. This proposal makes it clear that such early thought processes are protected from disclosure, while requiring disclosure of any materials on which an expert relies in formulating an opinion.

Retained vs. Non-retained Experts

The present proposed Rule does not differentiate between experts specially retained to testify and those who were not specially retained but rather have, by virtue of their relationship to

the case, expert knowledge and/or opinions. Treating physicians are the prototype non-specially retained expert, but many other professionals also appear as non-specially retained experts: house inspectors, building contractors, and auto mechanics are just a few. These witnesses are typically not readily available to consult with a party's attorney, as they are not in the case for the business of testifying. Some in fact are downright hostile; most do not appreciate being required to testify and may refuse to meet with an attorney unless subpoenaed. When that occurs, the parties cannot disclose that expert's opinion prior to deposition, and the expert may well have to be deposed twice in order to first disclose the detailed requirements applicable to specially retained experts and again in order to obtain that testimony after such disclosure. The duty to respond to discovery concerning such witnesses should therefore be limited, based on the fact that such witnesses may not fully cooperate with the party, making it impossible for that party to provide more detailed information typically sought and obtained from specially retained experts.

MAJ suggests a distinction along these lines:

> If an expert 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 relied upon by the witness in forming such opinions; the witness's qualifications; and a statement of the compensation to be paid the witness if retained.
>
> If an expert 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 testify and a summary of the facts and opinions on which the witness is expected to testify.

Privilege Log

Neither the present rule nor the present proposed rule has a requirement for provision of a privilege log. The federal rules do require a privilege log, and one is often requested in discovery. Failure to disclose a correct privilege log creates confusion regarding what documents are in fact being withheld versus what objections based upon privilege are being made as a matter of principle, although no actual privileged documents exist. Requirement of a privilege log would reduce uncertainty in the discovery process and minimize discovery disputes which must be brought before the court.

It is recommended that a privilege log requirement be contained in any revision of Rule 26. Proposed Rule 26(b)(6) would provide:

(6) Claiming privilege and privilege log. 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. Such privilege log must include, at a minimum, the following:

1. Date of document or item;
2. Author of document or item;
3. Identification of persons, if any, to whom document or item is addressed;
4. General subject matter of document or item;
5. Specific basis of claim or privilege;
6. Identification of person or persons in possession of document or copies thereof.

RULE 29 Stipulations Regarding Discovery Procedure

Rule 29 rule currently allows the parties to stipulate on issues such as the taking of depositions and extension of time for responding to discovery but requires court approval for "stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery. . ." This rule is honored more in the breach. The amendment of the rule in the form suggested by the federal rules would be more consistent with practice and reduce unnecessary court involvement, without allowing interference with other deadlines.

It is recommended that Rule 29 be amended as follows:

Unless the court orders otherwise, the parties may stipulate that:

(a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified - in which event it may be used in the same way as any other deposition; and

(b) other procedures governing or limiting discovery be modified - but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

RULE 30 Depositions Upon Oral Examination

Disputes during depositions are one of the major sources of allegations of unprofessional behavior. Coaching the witness, bullying the witness or opposing counsel, making objections for

the purpose of disrupting the interrogation are all common complaints. MAJ suggests that the following federal rule provision, if followed and enforced, would aid in stopping such tactics:

> 1) the requirement that "**an objection must be stated concisely in a non-argumentative and non-suggestive manner**"
>
> 2) the requirement that an attorney "may instruct the deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion to limit or terminate the deposition pursuant to this rule."

RULE 33 Interrogatories to Parties

RULE 33(d) Option to produce business records.

The provision allowing a party the option of producing business records rather than providing a succinct answer to an interrogatory is in the experience of many attorneys used to dodge answering discovery or by way of a "document dump" to obfuscate and delay discovery. A reasonable compromise is found in the Federal Rules' provision that requires a party who is responding to an interrogatory by reference to business records to "specify the records in sufficient detail to enable the interrogating party to locate and identify them **as readily as the responding party could. . . .**"

RULE 34 Production of Documents and Things and Entry upon Land for Inspection and other Purposes

Parties responding to Rule 34 requests often respond by stating that the "documents will be produced" at a specified place, or at the offices of counsel, or the like, without provision for the time or date of such a production. When the opposing party requests a date for such production, it may be delayed indefinitely. Clearly, the easiest way to avoid such delay is to require that documents be produced with the response, but such could lead to needless production of copies not desired. The alternative is that the production or inspection be required to take place within the time allowed to respond. The Federal Rule's provision seems workable:

> For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

In addition, when objections are made to production, the discovering party often is unable to determine whether any items are being withheld pursuant to the objection. A provision requiring that information should be added, along these lines:

> An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

RULE 40 Assignment of Cases for Trial

MAJ would suggest that with the adoption of Rule 16, Rule 40 is no longer necessary.

RULE 45 Subpoenas

Rule 45 requires that subpoenas be issued by the clerk of court. The Federal provision allowing attorneys to issue subpoenas has been in effect for over twenty years and has worked well. The process of having subpoenas issued by the clerk often delays discovery and creates unnecessary work for the courts. MAJ recommends adoption of a provision allowing attorneys to issue subpoenas.

RULE 54 Judgments; Cost

MAJ suggests that there be no requirement of a specific *ad damnum* amount in a complaint. Often, when a lawsuit is filed, damages are not final, and the current rule encourages over-statement of the amount in order to avoid a situation with a jury verdict greater than the *ad damnum* demand. MAJ suggests that the first sentence of the Rule be changed to "a judgment by default shall not be different **in kind from or exceed an amount that is supported by the proof**." This deletes the requirement that there be an *ad damnum* amount stated in the complaint.

As to the last sentence, the recommendation is to change it as follows: "however, final judgment shall not be entered for a monetary amount greater than that supported by the proof."