

REQUEST FOR COMMENTS

The Supreme Court of Mississippi seeks comments from the bench, the bar, and the public on proposed amendments to Rules 16 and 26 of the Mississippi Rules of Civil Procedure and to Rule 4.04 of the Uniform Rules of Circuit and County Court Practice.

Comments must be filed with the Clerk of Appellate Courts at Post Office Box 249, Jackson, Mississippi 39205. **The filing deadline is May 15, 2015.**

The proposed amendments relate, in part, to three motions filed by the Advisory Committee on Rules:

- Motion to Amend Certain Uniform Rules, filed August 14, 2009, and posted for comment previously on November 3, 2009;
- Motion to Amend Rule 16 of the Mississippi Rules of Civil Procedure, filed September 15, 2011, and posted for comment previously on May 7, 2012, and March 26, 2014; and
- Motion to Amend Rule 26 of the Mississippi Rules of Civil Procedure, filed September 19, 2011, and posted for comment previously on October 28, 2011.

The Advisory Committee's motions and the Court's proposed amendments are set forth below.

PROPOSED AMENDMENTS TO
RULES 16 AND 26 OF THE MISSISSIPPI
RULES OF CIVIL PROCEDURE AND TO
RULE 4.04 OF THE UNIFORM RULES OF
CIRCUIT AND COUNTY COURT PRACTICE

RULE 16. PRE-TRIAL PROCEDURE

(a) Scheduling Order.

(1) Within 45 days of all defendants being served with the complaint or 120 days after the complaint is filed, the court shall prepare a scheduling order. The scheduling order shall contain:

(A) A trial date to be set by the court that shall be no less than one year and no more than eighteen months after the date set in subsection (1), above, upon which the court is to prepare the scheduling order, unless all named parties request an earlier trial date;

(B) A deadline by which motions for summary judgment must be filed, which deadline shall be 90 days before the trial date;

(C) A deadline by which all motions challenging another party's expert must be filed, which deadline shall be 90 days before the trial date;

(E) A discovery deadline by which all discovery must be completed, which deadline shall be 120 days before the trial date;

(F) A deadline by which defendant(s) must comply with the expert witness disclosures mandated by Rule 26(4)(A), which deadline shall be 150 days before the trial date; and

(G) A deadline by which plaintiff(s) must comply with the expert witness disclosures mandated by Rule 26(4)(A), which deadline shall be 180 days before the trial date.

Upon motion of the parties and good cause shown or by order of the court, the deadlines required by subsections (a)(1)(B) – (G) may be modified.

(2) Within 15 days of the date set in subsection (1), above, upon which the court shall begin preparing the scheduling order, the judge shall sign the scheduling order for entry into the record.

(3) The following categories of cases are exempt from the requirements in subsections (a)(1) and (2):

(A) cases the principal purpose of which is to collect on an open account or other liquidated debt;

(B) cases governed by M.R.C.P. 81; and

(C) cases that will be arbitrated and governed by the statutory arbitration provisions found at Miss. Code Ann. §11-15-1 *et. seq.*

If the parties in any case exempted by subsection (a)(3)(A) or (B) above unanimously desire a scheduling order, then an agreed scheduling order may be jointly drafted and submitted to the judge. In a case that is not otherwise exempt from the requirements in subsections (a)(1) and (2), a court may, upon joint motion by all the parties, exempt such case from such requirements.

(b) Pre-trial Conference

(1) In any action the court may on its own motion or on the motion of any party, and shall on the motion of all parties, direct the attorneys for the parties to appear before it at least 20 days before the case is set for trial for a conference to consider and determine:

- ~~(a)~~ (A) the possibility of settlement of the action;
- ~~(b)~~ (B) the simplification of the issues;
- ~~(c)~~ (C) the necessity or desirability of amendments to the pleadings;
- ~~(d)~~ (D) itemizations of expenses and special damages;
- ~~(e)~~ (E) the limitation of the number of expert witnesses;
- ~~(f)~~ (F) the exchange of reports of expert witnesses expected to be called by each party;
- ~~(g)~~ (G) the exchange of medical reports and hospital records, but only to the extent that such exchange does not abridge the physician-patient privilege;
- ~~(h)~~ (H) the advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
- ~~(i)~~ (I) the imposition of sanctions as authorized by Rule 37;
- ~~(j)~~ (J) the possibility of obtaining admissions of fact and of documents and other exhibits which will avoid unnecessary proof;
- ~~(k)~~ (K) in jury cases, proposed instructions, and in non-jury cases, proposed findings of fact and conclusions of law, all of which may be subsequently amended or supplemented as justice may require;
- ~~(l)~~ (L) such other matters as may aid in the disposition of the action.

(2) The court may enter an order reciting the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any other matters considered, and limiting issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

[Amended effective March 1, 1989; April 13, 2000, _____.]

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, electronic or magnetic data, 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 and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:~~

(A) (i) ~~A party may through interrogatories require any other party to~~ **Within the time set by scheduling order pursuant to Rule 16(a)(1),** each party shall identify each person ~~whom the other party~~ **the party** expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subsection (b)(4)(C) of this rule, concerning fees and expenses, as the court may deem appropriate.

(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) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(4)(A)(ii) and (b)(4)(B) of this rule, and (ii) with respect to discovery obtained under subsection (b)(4)(A)(ii) of this rule, the court may require, and with respect to discovery obtained under subsection (b)(4)(B) of this rule, the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Electronic Data. To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot-through reasonable efforts-retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

(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. 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 one or more of the following:

- (1) that the discovery not be had;
- (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed to be opened only by order of the court;
- (7) that a trade secret or other confidential research, development, or commercial information not

be disclosed or be disclosed only in a designated way;

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

(9) the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, oppression or undue burden or expense, including provision for payment of expenses attendant upon such deposition or other discovery device by the party seeking same.

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

(e) 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. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement that party's response with respect to any question directly addressed to (A) the identity and location of persons (i) having knowledge of discoverable matters, or (ii) who may be called as witnesses at the trial, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony.

(2) A party is under a duty seasonably to amend a prior response if that party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) 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.

Rule 4.04
DISCOVERY DEADLINES AND PRACTICE

~~A. All discovery must be completed within ninety days from service of an answer by the applicable defendant. Additional discovery time may be allowed with leave of court upon written motion setting forth good cause for the extension. 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.~~

BA. 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.

B. 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.

MOTIONS FILED BY THE
ADVISORY COMMITTEE ON RULES

COPY

IN THE SUPREME COURT OF MISSISSIPPI

IN RE: UNIFORM RULES OF
CIRCUIT AND COUNTY
COURT PRACTICE

FILED

RULES 89 R 99025
89 R 99006

AUG 14 2009

UNIFORM CHANCERY
COURT RULES

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

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 its gate-keeping responsibility under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 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.

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Second, the proposed amendment includes a new provision relating to expert witnesses. The timing of *Daubert* issue resolution has had no guidance by rule resulting in the uncertainty of the admissibility of an expert's testimony sometimes until the eve of trial. The proposed amendment allows either party or the Court, no later than 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

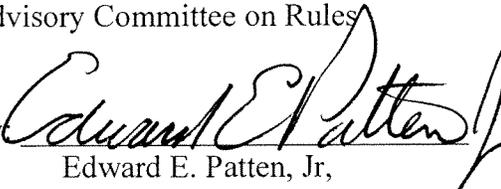
Uniform Chancery Court Rule 1.01 is the counterpart in Chancery practice to Rule 4.04 of the Uniform Rules of Circuit and County Court Practice. The proposed amendments and comments are the same with one exception. The comment states, "Generally, absent a scheduling order the process of a Rule 1.10 will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

The Committee respectfully 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 ~~stricken 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, ~~a~~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.

B.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.

C.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 "establish[] 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 of Jackson 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 limine* 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,” *Cortes-Irizarry v. Corporacion Insular De Seguros*, 111 F.3d 184, 188 (1st Cir. 1997). Still, “a full-scale *Daubert* 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 B). 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, ~~a~~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.

B.-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.

C.-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 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(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 limine* 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,” *Cortes-Irizarry v. Corporacion Insular De Seguros*, 111 F.3d 184, 188 (1st Cir. 1997). Still, “a full-scale *Daubert* 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 1.10(B)(2) requires a party to bring a *Daubert* 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).

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SEP 15 2011

IN THE SUPREME COURT OF MISSISSIPPI

IN RE: THE MISSISSIPPI RULES
OF CIVIL PROCEDURE

RULES 89-R-99001

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

MOTION TO AMEND RULE 16
OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE

The Advisory Committee on Rules (“Committee”) recommends that the Court adopt amendments to Rule 16 of the Mississippi Rules of Civil Procedure, its comment, and a proposed form. In support thereof, the Committee would show unto the Court the following:

1.

Over the past several years, the Mississippi Supreme Court has referred to the Committee various inquiries and requests from members of the Mississippi Bar asking for consideration of a rule requiring mandatory scheduling orders/trial settings. After due consideration and discussion, the Committee determined that a rule pertaining to scheduling orders and trial settings would be beneficial to both the bench and the bar.

2.

The proposed amendment to Rule 16 is “self-executing”—meaning the lawyers, rather than the judge, is responsible for drafting the scheduling order. To keep a judge’s involvement to a minimum, the proposed amendment directs the court administrator to provide attorneys with a trial date and then sets automatic dates for all other deadlines based on the trial date. As the proposed amendment mandates all the deadlines, there is no room for disagreement among the attorneys and, therefore, no need to involve the judge. Once the agreed Scheduling Order is prepared, it is submitted to the Judge for

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signature and entry. The proposed amendment further provides for how the Scheduling Order may be modified.

3.

The proposed amendment applies to all cases other than those specifically exempted—the categories of cases exempted include suits on open accounts or other liquidated debts; M.R.C.P. Rule 81 cases; and cases to be arbitrated which are governed by statute.

4.

The proposed amended Rule 16 is attached hereto as Exhibit A and incorporated herein by reference as though copied at length herein. M.R.C.P. Rule 16 currently requires the court to hold a pretrial conference at the request of all parties and authorizes the court to hold a pretrial conference on its own motion or the motion of any party. After any such conference, the court may enter a pretrial order. The proposed amendment to Rule 16 leaves these provisions intact and the proposed amendment would be inserted as a subsection to Rule 16.

5.

The Committee further proposed an amendment to the Historical Note and the Comment as set forth in Exhibit A hereto.

6.

For the Court's further consideration, the Committee submits a proposed Agreed Scheduling Order form for adoption. A copy of the proposed form is attached as Exhibit B hereto.

7.

The proposed amendment requiring the entry of scheduling orders would further promote the ends of justice and facilitate the just, efficient, and speedy determination of every action.

WHEREFORE, PREMISES CONSIDERED, the Committee respectfully requests that the Court consider the proposed amendment to Rule 16 of the Mississippi Rules of Civil Procedure, its comment and historical note, and the proposed Agreed Scheduling Order form. Further, the Committee requests that should the Court adopt the proposed amendment, the amendment to Rule 16 be effective for any and all cases filed after the adoption of the proposed amendment.

Respectfully submitted, this, the 14th day of September, A.D., 2011.

MISSISSIPPI SUPREME COURT ADVISORY
COMMITTEE ON RULES

BY:



COLETTE A. OLDMIXON, CHAIR

RULE 16. PRE-TRIAL PROCEDURE

(a) Scheduling Order.

(1) Within 45 days of any defendant being served with the complaint or 45 days after any defendant has appeared, the attorneys of record and any unrepresented party that has appeared in the case, shall confer for the purpose of drafting an Agreed Scheduling Order. The Agreed Scheduling Order shall contain:

(A) A trial date that shall be provided by the court administrator or other court personnel upon request by counsel of record for any party or upon request by an unrepresented party that has appeared in the case. If, in a multi-county district, a trial date cannot be assigned when requested because there has not yet been an order establishing terms of court for the following calendar year, the court administrator or other court personnel shall provide a trial date as soon after October 1 as is reasonably possible.

(B) A deadline by which motions for summary judgment must be filed, which deadline shall be 90 days before the trial date;

(C) A deadline by which motions challenging expert testimony pursuant to M.R.E. 702 must be filed, which deadline shall be 90 days before the trial date;

(E) A discovery deadline by which all discovery must be completed, which deadline shall be 30 days before the deadline for filing motions for summary judgment;

(F) A deadline by which defendant(s) must serve responses to expert interrogatories, which deadline shall be 75 days before the discovery deadline;

(G) A deadline by which plaintiff(s) must serve responses to expert interrogatories, which deadline shall be 120 days before the discovery deadline; and

(H) A deadline by which motions to join additional parties and/or amend the pleadings must be served, which deadline shall be 90 days after any defendant has been served with the complaint or has entered an appearance in the case.

Upon agreement of the parties or by order of the Court for good cause shown, the deadlines required by subsections (a)(1)(B) – (H) may be modified.

(2) Within 15 days of conferring pursuant to subsection (a)(1), the attorneys of record and any unrepresented parties participating in the conference shall submit an Agreed Scheduling Order to the judge for signature and entry into the record. The attorneys of record and all unrepresented parties participating in the conference are jointly responsible for arranging the conference, conducting the conference, obtaining a trial date from the court administrator or other court personnel, drafting the Agreed Scheduling Order and submitting the Agreed Scheduling Order to the judge.

EXHIBIT 1

(3) The following categories of cases are exempt from the requirements in subsections (a)(1) and (2):

(A) cases the principal purpose of which is to collect on an open account or other liquidated debt;

(B) cases governed by M.R.C.P. 81; and

(C) cases that will be arbitrated and governed by the statutory arbitration provisions found at Miss. Code Ann. §11-15-1 et. seq.

If the parties in any case exempted by subsection (a)(3)(A) or (B) above unanimously desire a scheduling order, then an Agreed Scheduling Order may be jointly drafted and submitted to the judge. In a case that is not otherwise exempt from the requirements in subsections (a)(1) and (2), a court may, upon joint motion by all the parties, exempt such case from such requirements.

(b) Pre-trial Conference

(1) In any action the court may on its own motion or on the motion of any party, and shall on the motion of all parties, direct the attorneys for the parties to appear before it at least twenty days before the case is set for trial for a conference to consider and determine:

- (a) (A) The possibility of settlement of the action;
- (b) (B) the simplification of the issues;
- (c) (C) the necessity or desirability of amendments to the pleadings;
- (d) (D) itemizations of expenses and special damages;
- (e) (E) the limitation of the number of expert witnesses;
- (f) (F) the exchange of reports of expert witnesses expected to be called by each party;
- (g) (G) the exchange of medical reports and hospital records, but only to the extent that such exchange does not abridge the physician-patient privilege;
- (h) (H) the advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
- (i) (I) the imposition of sanctions as authorized by Rule 37;
- (j) (J) the possibility of obtaining admissions of fact and of documents and other exhibits which will avoid unnecessary proof;
- (k) (K) in jury cases, proposed instructions, and in non-jury cases, proposed findings of fact and conclusions of law, all of which may be subsequently amended or supplemented as justice may require;
- (l) (L) such other matters as may aid in the disposition of the action.

(2) The court may enter an order reciting the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any other matters considered, and limiting issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

[Amended effective March 1, 1989; April 13, 2000, _____.]

Advisory Committee Historical Note

Effective _____, Rule 16 was amended so as to require, in most cases, the entry of a scheduling order containing a trial date and other deadlines.

Effective April 13, 2000, Rule 16 was amended to allow the conference to be held pursuant to the court's motion. 753-754 So. 2d. XVII (West Miss. Cas. 2000.)

Effective March 1, 1989, Rule 16 was amended to abrogate provisions for a pretrial calendar. 536-538 So.2d XXI (West Miss. Cas. 1989).

Comment

Rule 16 governs ~~the~~ pretrial conferences and scheduling orders. ~~It provides that such a Pretrial conferences may be held on the court's own motion or on the motion of any party and shall be held on the motion of all parties. It authorizes the amending or supplementing of proposed jury instructions, or of proposed findings of fact and conclusions of law in non jury cases, after they have been preliminarily agreed upon in the pretrial conference. Also, it provides that the court may enter a pretrial order, and if such order is entered it "shall control the subsequent course of action unless modified."~~ In most cases, a scheduling order setting a trial date and other deadlines is required. M.C.A. § 9-5-3 and M.C.A. § 9-7-3 provide that, with respect to multi-county chancery and circuit court districts, an order be entered by October 1 each year establishing the terms of court for the following calendar year. In the event such an order is not entered, the statutes provide that the court terms will be the same as the previous year. Thus, Rule 16(a)(1)(A) provides that if a trial date cannot be assigned when requested because the terms of court have not yet been set for the next calendar year, a trial shall date shall be assigned as soon after October 1 as is reasonably possible.

[Comment amended April 18, 1995; April 13, 2000, _____.]

IN THE _____ COURT OF _____ COUNTY, MISSISSIPPI

A.B., Plaintiff(s)

v.

Civil Action, File No.

C.D., Defendant(s)

AGREED SCHEDULING ORDER

This Scheduling Order, including the deadlines herein established, can be modified only by order of the court upon a showing of good cause. IT IS HEREBY ORDERED:

1. The action is set for trial commencing on: _____.
2. Motions for joinder of parties or amendments to the pleadings shall be served by: _____.
3. Plaintiff shall serve responses to Defendant's expert interrogatories by: _____.
4. Defendant shall serve responses to Plaintiff's expert interrogatories by: _____.
5. All discovery shall be completed by: _____.
6. Motions for summary judgment and/or motions challenging expert testimony pursuant to M.R.E. 702 shall be filed by: _____.

ORDERED: _____
[date]

[signature of Judge]

EXHIBIT 2

COPY

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OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

IN THE SUPREME COURT OF MISSISSIPPI

IN RE: THE MISSISSIPPI RULES
OF CIVIL PROCEDURE

RULES 89-R-99001

**MOTION TO AMEND RULE 26 OF THE
MISSISSIPPI RULES OF CIVIL PROCEDURE**

The Advisory Committee on Rules (“Committee”) recommends that the Court adopt amendments to Rule 26 of the Mississippi Rules of Civil Procedure and to its Comment. In support thereof, the Committee would show unto the Court the following:

1.

Given the advancement of technology and its ever increasing presence in litigation, the Committee recommends amending Rule 26(b)(1) to delete the reference to “electronic or magnetic data” and to insert and substitute “electronically stored information”. Further, the Committee recommends striking in whole Rule 26(b)(5) regarding discovery of electronic data and adopting in its stead the following:

(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; (vi) 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.

-1-

MOTION# 2011-2599

The proposed amendment of Rule 26(b)(5), in addition to eliminating the reference to “data or information in electronic or magnetic form” also provides a non-exhaustive list of the types of conditions a judge may place on electronic discovery.

2.

DISCOVERY PERTAINING TO EXPERT WITNESSES

Committee recommends that Rule 26(b)(4)(A) be amended to provide for two-tiered discovery regarding witnesses who will offer expert testimony at trial.

(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.

With respect to retained and specially employed expert witnesses who are expected to testify at trial, the proposed amendment authorizes more detailed interrogatories than those permitted concerning other expert witnesses, (i.e., the treating physician, the mechanic who repairs the vehicle, the plumber, etc.) expected to testify because a party can expect retained and specially employed experts to fully cooperate during discovery and trial.

a. Proposed amendment Rule 26(b)(4)(A)(ii) 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, previous expert testimony, the witness’s compensation to be paid; and a list of any exhibits that will be used to summarize or support the opinions.

(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 four 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.

b. Proposed amendment Rule 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, i.e., treating physicians, who 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 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 party's response under Rule 26(b)(4)(A)(iii) would be 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.

(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.

c. Proposed amendment Rule 26(b)(4)(A)(iv) permits the deposition of expert witnesses once the interrogatory response has been received and the timing of said deposition.

(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.

d. Proposed amendment Rule 26(b)(4)(C) and Rule 26(b)(4)(D) grant trial preparation material or "work product" protection to draft responses to expert interrogatories and certain attorney-expert communications in an effort to avoid costly and 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 understanding of the case. The protection is not absolute. A party may be entitled to overcome the trial preparation material protection, pursuant to Rule 26(b)(3).

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

(D) 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 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.

e. Proposed amendment Rule 26(b)(4)(E) addresses compensation of a retained or specially employed expert witness appearing for a deposition and for discovery obtained under Rule 26(b)(4)(B).

~~(E)~~ (E) Unless manifest injustice would result, ~~(†)~~ the court shall require ~~that~~ the party seeking discovery taking the deposition of an opposing party's expert who has been

specialy retained or employed to present expert testimony at trial pay the expert a reasonable fee for time spent ~~in responding to discovery under subsections (b)(4)(A)(ii) and (b)(4)(B)~~ giving deposition testimony and a reasonable fee for up to two hours actually spent preparing for such deposition. ~~and (ii) With respect to discovery obtained under subsection (b)(4)(A)(ii) of this rule, the court may require, and 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 ~~other~~ party who retained or specially employed the expert a fair portion of the fees and expenses reasonably incurred by ~~the latter~~ such party in obtaining the facts and opinions from the expert.

3.

The Committee recommends adopting proposed Rule 26(b)(6) which requires a responding party to generally describe information withheld from discovery based on an allegation of privilege or trial preparation material and establishes a process to deal with inadvertent production of privileged or trial preparation material.

(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.

Committee recommends amendments as follows to Rule 26(d) which adds a provision setting out considerations for the limiting of discovery by the court:

(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:

- (1) (A) that the discovery not be had;
- (2) (B) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) (C) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) (D) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (5) (E) that discovery be conducted with no one present except persons designated by the court;
- (6) (F) that a deposition after being sealed is to be opened only by order of the court;
- (7) (G) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
- (8) (H) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;
- (9) (I) ~~the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, oppression or undue burden or expense, including provision for 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.

5.

Committee recommends the following amendment to Rule 26(f) pertaining to supplementation of discovery responses:

f) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty ~~seasonably~~ to seasonably supplement that party's response with respect to any question directly addressed to ~~(A) the identity and location of persons~~ ~~(i) (A) having knowledge of discoverable matters, or~~ ~~(ii) (B) who may be called as witnesses at the trial, and~~ ~~(B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony.~~ A party is also under a duty to seasonably supplement that party's response to any interrogatory authorized pursuant to subsection (b)(4)(A)(i),(ii) or (iii) of this rule.

(2) A party is under a duty ~~seasonably~~ to seasonably amend a prior response if that party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) 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.

6.

Attached hereto as Exhibit 1 to this motion is a copy of the proposed changes/amendments and the proposed amended and explanatory comment.

7.

Attached as Exhibit 2 to this motion is a copy of the entire text of Rule 26 with the proposed amendments and deletions.

The Committee respectfully requests that the Court consider the proposed amendments to Rule 26 of the Mississippi Rules of Civil Procedure and requests an opportunity, if it pleases the Court, to meet with the Court to discuss the proposed amendments, especially the two tiered approach to discovery as to experts and those pertaining to the discovery of electronically stored information.

Respectfully submitted, this, the 16th day of September, A.D., 2011.

MISSISSIPPI SUPREME COURT
ADVISORY COMMITTEE ON RULES

BY: 
COLETTE A. OLDMIXON, Chair

Rule 26. General Provisions Governing Discovery

(a) Discovery methods.

(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, ~~electronic or magnetic data~~ 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 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.*

(4) *Trial Preparations: Experts.*

Discovery of facts known and opinions held by experts, otherwise discoverable under subsection (b)(1) of this rule ~~and acquired or developed in anticipation of litigation or for trial,~~ may be obtained only as follows:

~~(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.~~

(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.

EXHIBIT 1

(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 four 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.

~~(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subsection (b)(4)(C) of this rule, concerning fees and expenses, as the court may deem appropriate.~~

(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) regardless of the form in which the draft is recorded.

(D) 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 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.

~~(C)~~ (E) Unless manifest injustice would result, ~~(i)~~ the court shall require ~~that the party seeking discovery 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 in responding to discovery under subsections (b)(4)(A)(ii) and (b)(4)(B) giving deposition testimony and a reasonable fee for up to two hours actually spent preparing for such deposition.~~ ~~and (ii)~~ With respect to discovery obtained under subsection (b)(4)(A)(ii) of this rule, the court may require, ~~and 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 other party who retained or specially employed the expert a fair portion of the fees and expenses reasonably incurred by the latter such party in obtaining the facts and opinions from the expert.~~

~~(5) *Electronic Data.* To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot through reasonable efforts retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.~~

~~(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; (vi) 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.

(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:

- (1) (A) that the discovery not be had;
- (2) (B) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) (C) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) (D) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (5) (E) that discovery be conducted with no one present except persons designated by the court;
- (6) (F) that a deposition after being sealed is to be opened only by order of the court;
- (7) (G) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
- (8) (H) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

~~(9) (I) the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, oppression or undue burden or expense, including provision for 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.

(e) Sequence and Timing of Discovery.

(f) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty ~~seasonably~~ seasonably to supplement that party's response with respect to any question directly addressed to ~~(A) the identity and location of persons (i) (A) having knowledge of discoverable matters, or (ii) (B) who may be called as witnesses at the trial, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony.~~ A party is also under a duty to seasonably supplement that party's response to any interrogatory authorized pursuant to subsection (b)(4)(A)(i),(ii) or (iii) of this rule.

(2) A party is under a duty ~~seasonably~~ seasonably to amend a prior response if that party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) 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.

ADVISORY COMMITTEE HISTORICAL NOTE

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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)(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)(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)(C) & (D) grant trial preparation material or “work product” protection to draft responses to expert interrogatories and certain attorney-expert communications 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.

[Comment amended effective March 1, 1989; April 13, 2000. Comment amended effective May 29, 2003.]

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, ~~electronic or magnetic data~~ 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 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 preparation of the 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.

EXHIBIT 2

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 ~~and acquired or developed in anticipation of litigation or for trial,~~ may be obtained only as follows:

~~(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.~~

(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 four 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.

~~(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subsection (b)(4)(C) of this rule, concerning fees and expenses, as the court may deem appropriate.~~

(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) regardless of the form in which the draft is recorded.

(D) 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 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.

~~(E) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery 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 in responding to discovery under subsections (b)(4)(A)(ii) and (b)(4)(B) giving deposition testimony and a reasonable fee for up to two hours actually spent preparing for such deposition. and (ii) With respect to discovery obtained under subsection (b)(4)(A)(ii) of this rule, the court may require, and 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 other party who retained or specially employed the expert a fair portion of the fees and expenses reasonably incurred by the latter such party in obtaining the facts and opinions from the expert.~~

~~(5) *Electronic Data.* To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot through reasonable efforts retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court may also order that the requesting party pay the~~

~~reasonable expenses of any extraordinary steps required to retrieve and produce the information.~~

(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; (vi) 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:

- ~~(1)~~ (A) that the discovery not be had;
- ~~(2)~~ (B) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- ~~(3)~~ (C) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- ~~(4)~~ (D) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- ~~(5)~~ (E) that discovery be conducted with no one present except persons designated by the court;
- ~~(6)~~ (F) that a deposition after being sealed is to be opened only by order of the court;
- ~~(7)~~ (G) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

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

(9) (I) ~~the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, oppression or undue burden or expense, including provision for 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.

(e) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of the 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. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to seasonably supplement that party's response with respect to any question directly addressed to ~~(A) the identity and location of persons~~ (i) (A) having knowledge of discoverable matters, or (ii) (B) who may be called as witnesses at the trial, ~~and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony.~~ A party is also under a duty to seasonably supplement that party's response to any interrogatory authorized pursuant to subsection (b)(4)(A)(i),(ii) or (iii) of this rule.

(2) A party is under a duty seasonably to seasonably amend a prior response if that party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response, though correct when

made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

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An early accord or order on discovery may require later modification. Rule 26(e) allows such amendments freely. Again, cooperation among counsel should be the rule rather than the exception.

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)(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)(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)(C) & (D) grant trial preparation material or “work product” protection to draft responses to expert interrogatories and certain attorney-expert communications 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.

[Comment amended effective March 1, 1989; April 13, 2000. Comment amended effective May 29, 2003.]