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D. Jeremy Whitmire
Clerk of Appellate Courts
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Re: Comments on Proposed Amendment to Miss.R.Civ.P. 26

Dear Mr. Whitmire:

I am writing in support of the proposed amendment to Rule 26 regarding the disclosure of rebuttal expert opinions. The amendment will benefit the Courts, the plaintiff's bar, and the defense bar alike and is consistent with the stated purpose of the Rules of Civil Procedure.

When I was on the Rules Committee, the idea of a rule requiring a mandatory scheduling order with deadlines for the sequence and timing of expert disclosures was often discussed. More importantly, it seemed to be a rule change that counsel for both sides could support. Now, many years into the federal bars' experience with scheduling orders, it is apparent that state court judges and counsel are accustomed to the benefits of deadlines that pattern the practice in federal court.

When the federal courts adopted a rule change to require a specific deadline for the disclosure of contradictory or rebuttal experts, the federal court Advisory Committee did so with the understanding that the burden of proof in certain cases may, at times, lay with the plaintiff and at times with the defendant. Therefore, a specific deadline to allow the party with the burden of proof to disclose "expert testimony to be used solely to contradict or rebut the testimony that may be presented by another party's expert" was an acceptable procedure to "enhance the reliability of expert testimony." See, Note of Advisory Committee on (Federal) Rules - 1993 Amendment to Rule 26(a)(1)(D)(citing M. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U.Ill.L.Rev. 90).

This stated purpose for the rule change in federal court is consistent with our Supreme Court's stated purpose for the Mississippi Rules of Civil Procedure.

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In its adopting order, our Supreme Court opined that the stated purpose for the Rules of Civil Procedure was “to promote justice, uniformity, and the efficiency of the courts.” *See*, Order Adopting the Mississippi Rules of Civil Procedure (May 26, 1981). Under the current practice in state court, counsel for both sides typically disclose expert rebuttal testimony under the heading “Supplemental Expert Report.” Absent an agreement, this type of disclosure generates motion practice requiring the state court judge to exercise his or her discretion to consider: 1) whether the disclosure is too late; and/or, 2) whether the disclosure is a disguised attempt to interject new opinions. As the Court is probably aware, discretionary rulings are typically the genesis for future appeals.

The proposed amendment will give counsel and our trial judges guidance. Absent good cause, a disclosure of rebuttal testimony outside of the required thirty (30) days will be too late. Further, counsel and our trial judges will be on notice that the rebuttal opinion may not advance new arguments or evidence. Therefore, the proposed rule change creates uniformity and is an efficient means of addressing an issue that counsel for both sides may encounter.

Thank you for the opportunity and I hope that the above comments are beneficial.

Sincerely yours,

PITTMAN, ROBERTS & WELSH, PLLC



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