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D. Jeremy Whitmire
Clerk of Appellate Courts
P.O. Box 249
Jackson, MS 39205
Email: scpclerk@mssc.state.ms.us

Re: Comments on Proposed Amendments to MRCP 26

Dear Mr. Whitmire:

I represent plaintiffs and defendants in civil litigation, and I oppose the proposed Rule 26(b) amendment regarding rebuttal expert opinions.

The proposal for rebuttal experts permits a dilatory party, plaintiff or defendant, to escape not timely designating an expert. A rebuttal expert designation encourages the opposing party to file a surrebuttal expert and/or prompts competing motions to strike for many reasons, i.e., not proper rebuttal testimony, unfair prejudice, etc. The trial courts will likely experience an increase in expert designation gamesmanship.

A scheduling order would solve this issue, and I attach my article on same.

With mandatory scheduling orders, the filing of an answer or motion triggers the setting of deadlines. The trial court will decide expert deadlines, including the necessity of rebuttal expert deadlines. These deadlines will be entered well in advance of a trial date.

Under the current rules, if a lawsuit proceeds without a scheduling order, and a party makes a late designation, the trial court has many remedies at his/her disposal, including a trial continuance. In my practice, I rarely experience attempts at designating rebuttal experts. I have never felt the need to designate a rebuttal expert in 32 years of law practice. If the new rule is approved, I have a new opportunity to designate a late "rebuttal" expert and have the last word and last expert. The proposed rule for rebuttal witnesses will not save money or time. A mandatory scheduling order in all civil cases is the solution.

Best Regards,

Clark

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Enclosure

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attachment

Revisiting Mandatory Scheduling Orders

By L. Clark Hick Jr.

L. Clark Hicks, Jr. is the managing partner of Hicks Law Firm, PLLC, a civil litigation firm in Hattiesburg, Mississippi, where his practice is focused on civil litigation defense. He is a graduate of Mississippi College where he earned his BA Degree in History, special distinction with highest honors. He received his JD, cum laude, from the University of Mississippi School of Law where he served as Research Editor on the Law Journal.

Mississippi state trial courts do not uniformly require the issuance of scheduling orders in civil cases. As a result, state court litigants are subject to inordinate delays and exorbitant legal expenses. Civil cases routinely languish for years on trial court dockets without any justifiable cause. Now is the time for our Mississippi Supreme Court to adopt and implement rules mandating uniform scheduling orders for civil cases in our state courts.

Changes to our civil procedure rules cause a level of anxiety in our profession and judiciary and create an element of uncertainty. Many attorneys and judges express unfounded fear that changes to our rules create more work and unnecessary hassle. Experience, however, has taught us that over time, we in the legal system adapt to new rules of procedure and often prefer them.

Many years ago, our federal courts adopted a mandatory rule for the entry of a scheduling order in civil cases. F.R.C.P. 16(b) states:

> **(b) Scheduling.**
>
> **(1)** ***Scheduling Order.*** Except in categories of actions exempted by local rule, the district judge--or a magistrate judge when authorized by local rule--must issue a scheduling order;
>
> > **(A)** after receiving the parties' report under Rule 26(f);
> > or
> > **(B)** after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference.

The United States District Courts for the Northern and Southern districts adopted Local Uniform Civil Rule 16 which states:

> **(f) Case Management Order.**
>
> (1) The judicial officer will enter the case management order no more than fourteen calendar days after the case management conference.

Many practitioners bemoaned and resisted mandatory scheduling orders in the federal court system. The results of the adoption of compulsory scheduling orders, however, have been undeniable. Civil cases in our federal court system are proceeding more efficiently and uniformly with set deadlines, early alternative dispute resolution opportunities and dismissal by way of settlement or trial. See *Institute for the Advancement of the American Legal System, Civil Case Processing in the Federal District Courts (2009).*[1] Contrary to expectations, the federal case management orders did not contain inflexible, rigid deadlines. Magistrate and district judges routinely amend the deadlines for litigants and their attorneys on a showing of good cause. Trial judges have been lenient and expansive in their definition of good cause, allowing extensions due to unforeseen calendar conflicts or mere oversights by counsel. Even with modifications to scheduling, civil cases in federal court rarely remain active for years without good cause.

One commonly expressed concern of uniform scheduling orders in state court is that Mississippi civil litigators and judges will have a difficult time managing the administrative logistics of numerous deadlines. This concern is not well placed in today's age. Technology, including digital calendars and similar office management software, provide outstanding support to litigators, the judiciary, and their staff. More deadlines likely will require more attention, but attorneys will be less likely to procrastinate and ignore the files of their clients which deserve diligence and meaningful prosecution to resolution.

Discovery deadlines are not new to Mississippi state jurisprudence. Mississippi Uniform Circuit and County Court Rule 4.03 imposes discovery deadlines, yet few trial courts enforce the local rule. Rule 4.03 states:

> 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.

The same rule is found in the Uniform Chancery Court Rules at Rule 1.10. In practice, trial courts and practitioners often ignore the local rule believing it to be not practical, unwieldy and too burdensome. The reality is that noncompliance with the local rule causes cases to grow stale on court dockets and in attorneys' offices.

M.R.C.P. 16 provides an avenue for the implementation and use of scheduling orders. This rule addresses pre-trial procedures and provides:

> 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) The possibility of settlement of the action;
> (b) the simplification of the issues;
> (c) the necessity or desirability of amendments to the pleadings;
> (d) itemizations of expenses and special damages;
> (e) the limitation of the number of expert witnesses;
> (f) the exchange of reports of expert witnesses

expected to be called by each party;

(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) 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) the imposition of sanctions as authorized by Rule 37;

(j) the possibility of obtaining admissions of fact and of documents and other exhibits which will avoid unnecessary proof;

(k) injury 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) such other matters as may aid in the disposition of the action.

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.

In practice, however, trial judges and litigators rarely invoke M.R.C.P. 16. As a result, scheduling orders sporadically appear in Mississippi civil cases with no consistency or uniformity. A few trial judges strongly encourage scheduling orders. Other trial judges impose scheduling orders only when cases become protracted or unnecessarily contentious. A minority of jurisdictions have adopted local rules requiring scheduling orders. For instance, the Fourth Circuit rule states that within thirty (30) days after issue is joined in a case but no later than sixty (60) days, "counsel are required to present to the Court a proposed scheduling order, in the form attached hereto, setting forth deadlines for the joining of other parties and amending the pleadings; service of the motions; and the completion of discovery." The Fifth Circuit contains a similar rule, however, the deadline for presenting a scheduling order is no later than "120 days" after the complaint is filed.

This subject is not new in Mississippi. In 2001, the Mississippi Conference of Circuit Court Judges, by a majority vote, supported a proposal of the Mississippi Supreme Court to adopt time standards in civil cases. The conference panel did not support mandatory time standards but did endorse advisory time standards. The participating trial judges urged that they did not have the tools, resources, and reliable statistics to warrant mandatory time standards. The proposed time standards, championed by Chief Justice Pittman, were aspirational goals, including resolution of general civil cases within eighteen (18) months of the filing of a complaint.

On November 15, 2001, the Mississippi Supreme Court adopted the advisory time standard for civil cases effective January 1, 2002.[2] The standard applies to circuit, chancery, and county courts. Unfortunately, the advisory standards have had no quantifiable, data supported impact, and few attorneys and judges know the standards exist. Chief Justice Pittman's words in 2001 are applicable today when he said, "I just believe if there is a lack of timeliness in the courtroom, we destroy the public's confidence in what we do. We don't want to make important decisions too late." See *Mississippi Supreme Court News Article, Supreme Court Finalizes Time Standards*, November 20, 2001.[3]

The National Center for State Courts (NCSC) has drafted model time standards for trial courts to consider in civil cases. See *NCSC Model Time Standards for State Trial Courts.* (NCSC 2011)[4] The model standards have been approved by the Conference of State Court Administrators, the Conference of Chief Justices, the American Bar Association House of Delegates, and the National Association for Court Management. These organizations have determined that time standards establish expectations for timely justice in our American courts and promote faster resolution of cases, reduce delay, and minimize costs. General national time standards, approved by these organizations, provide that non-jury cases should be tried or disposed of within twelve (12) months after initial filing and that all jury cases should be tried or disposed of within eighteen (18) months after filing. While these deadlines are only guidelines, the NCSC notes in its report that several states have adopted mandatory time standards. Establishing fixed parameters for timely case processing improves court performance and promotes public trust and confidence that the courts are committed to the expeditious processing of cases.

Our trial courts should be committed to reducing delay and minimizing expense. Without setting time standards in civil cases, there are no expectations for the efficient administration of justice. Judicial resources are limited, but this fact should not be an impediment to the adoption of reasonable and flexible deadlines for the administration of a civil lawsuit. There should be uniformity and clear expectations regarding a civil trial date. Far too often, parties agree on a trial date, incur major time and expense, only to experience a continuance to the trial date. Trial courts routinely, at their own arbitrary discretion, postpone trials without discernable cause. Clients regularly spend years starting and stopping in preparation for a trial date and expend exponentially more in legal expenses to finally have their case heard. National research has shown that a court's ability to provide a firm trial date is associated with shorter times to disposition in civil cases. See *Examining Court Delay: The Pace of Litigation in 26 Urban Trial Courts,* 1987.[5]

The inquiry should focus on determining the process which best serves the public and all litigants in the court system. That method is the one which provides the shortest amount of time and the least amount of expense to resolution. A litigant may spend more undivided effort in a shorter calendar window under the governance of a scheduling order, but those expectations can be managed and budgeted from the outset of the representation and throughout the litigation.

One alternative to consider is the adoption of rules patterned after the Rules for Dismissal and Expedited Actions promulgated by the Texas Supreme Court. These rules were implemented to address the lengthy duration of lawsuits, high costs, and the degree of conflict in discovery. The rules originally applied to all

civil cases involving monetary damages of $100,000.00 or less and imposed mandatory discovery deadlines of 180 days from the filing date of the first discovery request with modifications only granted by the court upon the showing of good cause. The initial rules limited discovery to no more than six (6) hours of oral depositions along with limited written discovery of fifteen (15) in number for interrogatories, request for production, and request for admissions. Trial had to be scheduled ninety (90) days or less after the completion of discovery. After the implementation of the rules, an impact study showed that the rules were a success, resulting in resolution of cases at a faster pace. See *Civil Justice Initiative, Texas: Impact of the Expedited Actions Rules on the Texas County Courts at Law*, September 1, 2016.[6] Today, the rules in Texas have been amended to make mandatory scheduling orders applicable in all civil actions in which the relief sought is less than $250,000.00.

Mississippi litigators have adapted to mandatory case management orders in federal court. They can do the same in state court. The Mississippi Supreme Court should consider a renewed push to fulfill Chief Justice Pittman's desire to reduce delay, decrease costs, and improve the overall administration of justice for civil cases in our Mississippi state courts. Mandatory scheduling orders are one step in the right direction. ■

[1] https://www.uscourts.gov/sites/default/files/iaals_civil_case_processing_in_the_federal_district_courts_0.pdf

[2] Exempt from advisory time standards are estate and will probate proceedings, guardianships, conservatorships, commitment proceedings, petitions for name change, petitions for registration of foreign judgments and uncontested adoptions.

[3] https://courts.ms.gov/news/2001/11.20.01timestandards.php

[4] https://www.ncsc.org/__data/assets/pdf_file/0032/18977/model-time-standards-for-state-trial-courts.pdf

[5] https://ncsc.contentdm.oclc.org/digital/api/collection/ctadmin/id/11/download

[6] https://www.txcourts.gov/media/1452555/5-impact-of-the-expedited-actions-rules-on-the-texas-county-courts-of-law.pdf

*The Fallacy of Multitasking**

Dr. Jessica Cole, DPC LPC-S NCC

Dr. Jessica Cole is the current director of the Lawyers and Judges Assistance Program for the MS Bar Association. Previously, she held the Director of Psychological Health position under the direction of the United States Department of Defense (DoD) for over 8 years. She received her doctorate in professional counseling from Mississippi College, masters from Louisiana State University, and bachelor from University of Mississippi.

One of the biggest stressors of most professionals, especially attorneys, is feeling that they lack control of their time. It may not be so much of a time management issue, but instead the constant interruptions or attempting to multitask – answer emails, work on a brief, while watching an on-demand CLE. When you attempt to multitask, you lower your efficiency and performance. According to neurologist, Dr. David A. Merrill, when you multitask, you reduce your ability to store the memory in your brain – therefore that CLE you are watching while multitasking will not get stored in your memory – so what is the purpose? When you multitask, the result is split effort. The jobs that you are doing are not getting done as well as if you were focused on one at a time. Also, multitasking can increase your stress level – who wants more stress?

There are options to help increase productivity and efficiency while potentially decreasing stress. Two options to help decrease multitasking and increase focus discussed below are time blocking/chunking and the Pomodoro Technique. While each are similar, you may find that one works better for your work situation than the other.

Time blocking/chunking is taking your day and dividing it into smaller blocks. Each block is dedicated for a specific task. It is taking your to-do list and assigning each item to a specific block of time. The key to making this successful is prioritizing your to-do list in advance. This takes out the decision-making time and fatigue part of your day regarding what needs to be done next. It also gives you a hard stop when you need to make a transition to a different task. For example, set aside one hour each day at 10:30 am to review and answer emails. Once the hour is over, you switch to another task. This way you do not end up down a rabbit hole of answering emails and not accomplishing the higher priority tasks. Answering emails is important, of course, but there may be other tasks more time sensitive. During times when you are not answering emails, you would turn your notifications off to decrease distractions.

The Pomodoro Technique was created by Frances Cirillo in the 1980s. This technique requires determining which tasks need to be completed, setting a timer for approximately 25 minutes (24 if you are needing to bill for time). Turn off all notifications for any messages and focus only on that task for the 25 minutes. Upon completion of that task, take a 5-minute break. Research shows that trying to concentrate for longer than that amount of time could be counterproductive. This technique creates a sense of focus and urgency that increase productivity. During the break, walk around the office, grab a coffee, stretch, or meditate. Do something that feels like a reward – the break is just an important as the focused 25 minutes. After 4 intervals, it is recommended to take a longer break of about 15 minutes. It is important to hold strict boundaries for no interruptions during these work intervals.

There are several apps that can help with staying focused: Focus Mode, Forest, Focus Keeper, and many more. You can find one that works best for you. So, if you believe multitasking is resulting in lower than your best work product, maybe you should try one of these systems, incorporate an app, and see if your productivity levels go up and stress goes down! Let me know your results! ■

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