Serial: **206395**

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99002-SCT

FILED

JUN 17 2016

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

IN RE: MISSISSIPPI RULES OF EVIDENCE

ORDER

Now before the en banc Court is the Motion to Restyle the Mississippi Rules of Evidence filed by the Advisory Committee on Rules. A letter motion filed by the Committee is also before us.

In 2011, the Supreme Court of the United States approved amendments to restyle the Federal Rules of Evidence. The purpose of the restyle was to make the rules clearer and easier to use, without changing substantive meaning. The restyled Federal Rules of Evidence became effective December 1, 2011.

In late 2012, the Committee began restyling the Mississippi Rules of Evidence consistent with the restyled Federal Rules of Evidence. The Committee completed the restyling in early 2016, and on May 19, 2016, it moved the Court to adopt its proposed restyled Mississippi Rules of Evidence. The Court expresses its sincere appreciation for the Committee's commitment, diligence, and hard work.

The Committee's Motion to Restyle the Mississippi Rules of Evidence was published for comment on May 23, 2016. Rule 27(f) of the Mississippi Rules of Appellate Procedure prohibits this Court from taking any action on a proposal for 30 days once the proposal has

been published for comment. After due consideration, we find that that prohibition should be suspended. M.R.A.P. 2(c).

Having carefully considered the motion and its attachments, we find that the Committee's restyled Mississippi Rules of Evidence will benefit the bench and bar, and promote the fair and efficient administration of justice. We thus find that the restyled rules should be adopted with the following revisions.

First, on June 16, 2016, the Court entered an order substituting the title "Advisory Committee Note" for the title "Comment" for each comment to the Mississippi Rules of Evidence. As a result, we find that the restyled Mississippi Rules of Evidence should incorporate that change.

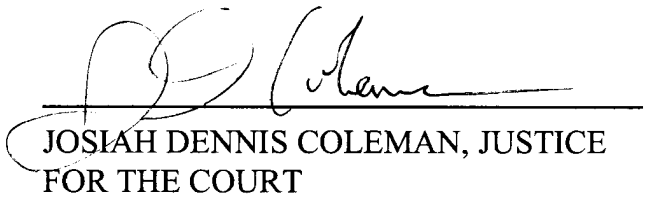
Second, on May 26, 2016—after the Committee had filed its Motion to Restyle the Mississippi Rules of Evidence—the Court entered an order amending Rule 103 of the Mississippi Rules of Evidence. As a result, the Committee has filed a letter motion to amend its restyling of Rule 103 to incorporate the May 26 amendment and to enlarge the accompanying Advisory Committee Note. We find that the letter motion should be granted.

IT IS THEREFORE ORDERED that the Advisory Committee on Rules' Motion to Restyle the Mississippi Rules of Evidence and letter motion are granted. Effective July 1, 2016, the Mississippi Rules of Evidence will be restyled as set forth in Exhibit A.

IT IS FURTHER ORDERED that the Clerk of this Court must spread this order upon the minutes of the Court and must forward a certified copy to West Publishing Company for

publication as soon as practical in the advance sheets of *Southern Reporter, Third Series (Mississippi Edition)*, and in the next edition of the *Mississippi Rules of Court*.

SO ORDERED, this the 16th day of June, 2016.



JOSIAH DENNIS COLEMAN, JUSTICE
FOR THE COURT

TO GRANT BOTH MOTIONS: WALLER, C.J., DICKINSON, P.J., LAMAR, KITCHENS, KING, COLEMAN, MAXWELL AND BEAM, JJ.

RANDOLPH, P.J., NOT PARTICIPATING.

Exhibit A

MISSISSIPPI RULES OF EVIDENCE

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ORDER ADOPTING THE
MISSISSIPPI RULES OF EVIDENCE

Effective January 1, 1986

SUPREME COURT OF MISSISSIPPI

On May 15, 1985, this Court entered an Order effecting preliminary actions with regard to the adoption of The Mississippi Rules of Evidence. That Order was published in the Southern Reporter, Mississippi Edition, on June 6, 1985, and provided for a ninety (90) day period of time within which interested persons could submit to the Court and to the Advisory Committee on Rules views with respect to The Mississippi Rules of Evidence, or any of them. That ninety (90) day period of time has now elapsed, and the Court has received from a number of interested persons written suggestions as well as other less formal suggestions.

The Court now having heard and considered in their entirety The Mississippi Rules of Evidence, and each of them, and having received the comments and suggestions of interested persons and having carefully and deliberately considered the same, and being of the opinion that the fair and efficient administration of justice in the courts of this state will be promoted hereby, it is

ORDERED:

(a) That the Mississippi Rules of Evidence in the form attached hereto shall be, and the same hereby are adopted as rules of evidence governing proceedings in the courts of the State of Mississippi to the extent and with the exceptions provided in said rules;

(b) that the comments appended to each rule in The Mississippi Rules of Evidence shall be, and they hereby are, adopted as the Official Comments of the Court and these Comments shall be used by all courts as authoritative guides to the interpretation of these Rules;

(c) that The Mississippi Rules of Evidence shall govern all proceedings in any action had on or after January 1, 1986;

(d) that the Clerk of this Court shall be, and [s]he hereby is, authorized and directed to spread this order at large on the minutes of the Court and to forward a certified copy of this order and the rules attached hereto to West Publishing Company for publication as soon as is reasonably practicable in a forthcoming

edition of the advance sheets of the Southern Reporter, Mississippi cases, the official reporter of decisions of this Court;

(e) that the Advisory Committee on Rules and each member thereof shall be, and they hereby are, commended for their outstanding, competent and diligent work in preparing and submitting to the Court The Mississippi Rules of Evidence together with the official comments thereto;

(f) that the Court expresses its appreciation to the Mississippi State Bar and the Mississippi Trial Lawyers Association and the members of each such organization for having filed with the Court petitions for the adoption of proposed Rules of Evidence and their having furnished to the Court insightful comments and critique and other assistance in the development of The Mississippi Rules of Evidence.

ORDERED this 24th day of September, 1985.

FOR THE COURT

Neville Patterson
Chief Justice

ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope; Definitions

(a) Scope. These rules apply to proceedings in Mississippi courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

(b) Definitions. In these rules:

(1) "civil case" means a civil action or proceeding;
(2) "criminal case" includes a criminal proceeding;
(3) "record" includes a memorandum, report, or data compilation; and
(4) a reference to any kind of written material or any other medium includes electronically stored information.

Advisory Committee Note

The language of Rule 101 has been amended, and definitions have been added, as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Rule 101(b)(3)-(4) expands the meaning of 'record,' a term used frequently in Articles VIII-X. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Style Project

The Rules of Evidence are the first set of Mississippi procedural rules to be restyled. They are based on the restyled Federal Rules of Evidence, which took effect in 2011, and which followed restyling of the Federal Rules of Civil Procedure in 2007, the Federal Rules of Criminal Procedure in 2002, and the Federal Rules of Appellate Procedure in 1998.

1. General Guidelines

In addition to following the restyled Federal Rules of Evidence, guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules,* Administrative Office of the United States Courts (1996) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). *See also* Joseph Kimble, *Guiding Principles for Restyling the Civil Rules,* in *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure*, at page x (Feb. 2005) (http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Prelim_draft_proposed_pt1.pdf); Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J. Legal Writing 25 (2008–2009). For specific commentary on the Evidence restyling project, *see* Joseph Kimble, *A Drafting Example from the Proposed New Federal Rules of Evidence*, 88 Mich. B.J. 52

(Aug. 2009); 88 Mich. B.J. 46 (Sept. 2009); 88 Mich. B.J. 54 (Oct. 2009); 88 Mich. B.J. 50 (Nov. 2009).

2. Formatting Changes

Many changes result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words remain unchanged. Rules 103, 404(b), 606(b), and 612 illustrate the benefits of formatting changes.

Structural divisions within a rule are identified using standard terms and cascading indents, illustrated by the following:

(a) the first level is a lettered subdivision (e.g. "subdivision (a)");
(1) followed by a numbered paragraph (e.g. "paragraph (a)(1)");
(A) then a subparagraph, identified by a capital letter (e.g. "subparagraph (a)(1)(A)"); and
(i) concluding with an item, identified by a romanette (e.g. "item (a)(1)(A)(i)").

Bullet points are employed within a rule to set out a list of roughly equal, parallel elements.

While the structural divisions within a rule generally follow this standard pattern throughout, a few exceptions were warranted. Lower-case lettered subdivisions were not used in Rules 803 and 902. Rather, those Rules retained numbered paragraphs as first-level formatting because changing their structure would disrupt electronic search results and thus impose transaction costs that outweigh any benefit in strictly consistent formatting.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved by not switching between "accused" and "defendant" or between "party opponent" and "opposing party" or between the various formulations of civil and criminal action/case/proceeding.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending

on context. The potential for confusion is exacerbated by the fact the word "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rules does not change their substantive meaning. *See, e.g.,* Rule 104(c) (omitting "in all cases"); Rule 602 (omitting "but need not"); Rule 611(b) (omitting "in the exercise of discretion").

The restyled rules also remove words and concepts that are outdated or redundant.

4. Rule Numbers

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules, and created within others, to achieve greater clarity and simplicity.

5. No Substantive Change

Special efforts were made to reject any purported style improvement that might result in a substantive change in the application of a rule. A change was considered "substantive" if any of the following conditions were met:

(a) Under current practice, the change could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of particular evidence);

(b) Under current practice, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question);

(c) The change would restructure a rule in a way that would alter the approach that courts and litigants have used to think about, and argue about, questions of admissibility (e.g. merging Rules 104(a) and 104(b) into a single subdivision); or

(d) The amendment would change a "sacred phrase" – one that has become so familiar in practice that to alter it would be unduly disruptive to practice and expectations. Examples include "unfair prejudice" and "truth of the matter asserted."

This rule requires that The Mississippi Rules of Evidence be applicable both in civil and criminal cases. Rule 1101 delineates more specifically what judicial proceedings are exempted from the rules' coverage.

Rule 102. Purpose
These rules shall be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Advisory Committee Note

The language of Rule 102 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 102 is a statement of the public policy to be served by a uniform set of rules. It is identical to Rule 102 of the Federal Rules of Evidence as well as numerous state codes.

Rule 103. Rulings on Evidence
(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
(1) if the ruling admits evidence, a party, on the record:
(A) timely objects or moves to strike; and
(B) states the specific ground, unless it was apparent from the context; or
(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Continuing Objection. The court may allow a continuing objection to evidence of the same or similar nature or subject to the same or similar objection.

(c) Definitive Rulings.
Once the court rules definitively on the record either before or at trial:
(1) a party need not renew an objection or offer of proof to preserve a claim of error for appeal;
(2) an objecting party does not waive or forfeit a claim of error by offering evidence of a conviction the court held admissible; and
(3) a party preserves a claim of error in a ruling to admit or exclude

evidence only if each condition of the ruling is fulfilled at trial.

(d) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(e) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(f) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Advisory Committee Note

The language of Rule 103 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The provisions concerning preserving a claim of error and continuing objections – formerly combined in a single paragraph – now appear in separate subdivisions. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 103 concerns the making of an evidentiary record for purposes of appeal.

(a) Subdivision (a) reflects existing Mississippi practice. (1) The objection must state the specific ground of objection unless the specific ground is apparent from the context. This adopts and carries forward the approach taken in *Murphy v. State*, 453 So. 2d 1290, 1293-94 (Miss. 1984). (2) By the same token, when a party objects to the exclusion of evidence, he must make an offer of proof to the court, noting on the record for the benefit of the appellate court what evidence the trial judge excluded. *See Brown v. State*, 338 So. 2d 1008 (Miss. 1976); *King v. State*, 374 So. 2d 808 (Miss. 1979). Federal Rule of Evidence 103, which is identical, has been interpreted to have no effect on the harmless error principle. *See Hughes v. State*, 470 So. 2d 1046, 1048 n. 1 (Miss. 1985).

Harris v. Buxton T.V., Inc., 460 So. 2d 828 (Miss. 1984) held that no offer of proof was necessary where a party was improperly prohibited from cross-examining a witness. Rule 103(a)(2) does not affect this holding.

(b) Subdivision (b) retains the existing practice of recognizing continuing objections, where allowed by the trial judge, as a viable means of preserving a point for appeal.

(c) Subdivision (c) has three distinct, but related, effects. First, paragraph (c)(1) provides that a claim of error with respect to a definitive evidentiary ruling (whether at or before trial, including rulings *in limine*) is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). When the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity. *See* MRCP 46 (formal exceptions unnecessary); *Jones v. Panola County*, 725 So. 2d 774, 775 (Miss. 1998) ("a ruling on 'a motion *in limine* regarding the introduction of evidence properly preserved the issue for appeal and a contemporaneous objection was not necessary' "); *see also Lacy v. State*, 700 So. 2d 602 (Miss. 1997). On the other hand, when the trial court has reserved its ruling or has indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's attention subsequently. Subdivision (c) thus imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point. Even when the court's ruling is definitive, nothing in this section prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal. The error, if any, in such a situation occurs only when the evidence is offered and admitted. Subdivision (c) does not apply to rulings other than those admitting or excluding evidence, such as rulings regarding, for example, the conduct of opening statements or closing arguments.

A definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. *See Old Chief v. United States,* 519 U.S. 172, 182 n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight."). Similarly, if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion. *See Huddleston v. United States,* 485 U.S. 681, 690 n.7 (1988) ("It is, of course, not the responsibility of the judge *sua sponte* to ensure

that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition.").

Secondly, paragraph (c)(2) provides that a party who objects to evidence of a prior conviction (under Rules 404 or 609, for example) that the court finds admissible in a definitive ruling, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, does not thereby waive the right to appeal the trial court's ruling. This is consistent with prior Mississippi law, *see McGee v. State*, 569 So. 2d 1191 (Miss. 1990), overruled on other grounds by *White v. State,* 785 So. 2d 1059 (Miss. 2001) (a defendant may preempt the state by offering evidence of the defendant's own prior conviction on direct examination without waiving the issue for appeal), *Malone v. State*, 829 So.2d 1253 (Miss. Ct. App. 2002), but contrary to federal law, *Ohler v. United States*, 529 U.S. 753 (2000) (when a trial judge rules that the government may use a prior conviction to impeach a defendant, a defendant waives the right to appeal the issue by introducing the conviction on direct examination). Importantly, paragraph (c)(2) does nothing to vitiate the authority of the trial judge to control the timing of the preemptive admission of evidence of a prior conviction when there is serious doubt about whether the opposing party will, in fact, offer the evidence. For example, the trial judge can impose a condition precedent to preemptive admission, such as by requiring the prosecution first to confirm, at or near the time of the defendant's testimony, its intent actually to offer evidence of a prior conviction. *See* Saltzburg, Martin, & Capra, Federal Rules of Evidence Manual, vol. 1, sec. 103.02[15] (2015). Notably, paragraph (c)(2) states only that a party who objects to evidence of *a prior conviction* that the court finds admissible in a definitive ruling does not waive the right to appeal the ruling by offering the evidence to remove the sting of its anticipated prejudicial effect. The Rule does not address whether or not a party's offer of other objectionable evidence that the court finds admissible in a definitive ruling operates as a waiver of the right to appeal the ruling. Paragraph (c)(2) leaves the development of the law of waiver in such other situations unaffected.

Third, paragraph (c)(3) embraces the principles of *Luce v. United States*, 469 U.S. 38 (1984), and its progeny. In *Luce*, the Supreme Court held that a criminal defendant must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. Paragraph (c)(3) extends the *Luce* principle to all situations in which the occurrence of a trial event is a condition that must be fulfilled before evidence is admitted or excluded (often described as a "condition precedent"). Such a condition might include the pursuit of a certain claim or defense, the introduction of a certain witness, the introduction of particular witness testimony (that the defendant never violated the law, for example), or the fulfillment of a particular evidentiary foundation. Lower federal courts have applied *Luce* to a

wide array of contexts. *See United States v. DiMatteo*, 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where the defendant's witness would be impeached with evidence offered under Rule 608). *See also United States v. Goldman*, 41 F.3d 785, 788 (1st Cir. 1994) ("Although *Luce* involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); *Palmieri v. DeFaria*, 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the in limine ruling would not be reviewed on appeal); *United States v. Ortiz*, 857 F.2d 900 (2d Cir.1988) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error for appeal); *United States v. Bond*, 87 F.3d 695 (5th Cir. 1996) (where the trial court rules in limine that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal). Paragraph (c)(3) represents a change in Mississippi practice. In *Williams v. State*, 684 So. 2d 1179 (Miss. 1996), the Mississippi Supreme Court noted it had yet to follow *Luce*. Rather, " 'a defendant wishing to present the point on appeal, absent having taken the witness stand himself, must preserve for the record substantial and detailed evidence of the testimony he would have given so that we may gauge its importance to his defense.' " (quoting *Heidelberg v. State,* 584 So. 2d 395 (Miss. 1991)).

(d) Rule 103(d) is consistent with pre-rule Mississippi case law which provided that a trial judge was entitled to explain his rulings. *Ratliff v. State*, 313 So. 2d 386 (Miss. 1975); *Ladnier v. State*, 273 So. 2d 169 (Miss. 1973).

The court may also permit the aggrieved party to preserve the record by dictating into the record a statement of the evidence offered but excluded. This accords with the rule announced in such cases as *Murray v. Payne*, 437 So. 2d 47, 55 (Miss. 1983).

(e) Subdivision (e) is an attempt to protect the jury from exposure to inadmissible evidence. It conforms to Mississippi practice. *See Cutchens v. State*, 310 So. 2d 273 (Miss. 1975).

(f) Subdivision (f), regarding plain error, is a restatement of that doctrine as it existed in pre-rule practice. It reflects a policy to administer the law fairly and justly. A party is protected by the plain error rule when (1) he has failed to perfect his appeal and (2) when a substantial right is affected. Miss.Sup.Ct.R. 6(b) and 11 permit a plain error rule: "The Court may, at its own option, notice a plain error not assigned or distinctly specified." *See also Boyd v. State*, 204 So. 2d 165 (Miss.

1967). If a party persuades the court of the substantial injustice that would occur if the rule were not invoked, the court may invoke the rule. *See Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975). The plain error rule may be applied in either criminal cases or civil cases. *See House v. State*, 445 So. 2d 815 (Miss. 1984).

Rule 104. Preliminary Questions

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) Relevance that Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later. If the proof is not introduced, the objector may request an instruction directing the jury to disregard the evidence. This request is not prerequisite to a motion for mistrial.

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;
(2) a defendant in a criminal case is a witness and so requests; or
(3) justice so requires.

(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

(f) Punitive Damages. If the court allows the jury to consider punitive damages, evidence of net worth may not be offered until the close of evidence.

Advisory Committee Note

The language of Rule 104 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The provisions regarding punitive damages – formerly subsumed in subdivision (a) – now appear as separate

subdivision (f). These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

(a) Subdivision (a) recognizes that a significant amount of a trial judge's responsibility is to make preliminary rulings. For instance, the judge, in cases where there is a question of the witness's competency, must first make a determination that the witness is competent before the witness is allowed to testify concerning the issue at bar. Other preliminary questions might concern privileges, the exclusionary rule, the voluntariness of confessions, and qualifications of experts. In *House v. State*, 445 So. 2d 815 (Miss. 1984), the Supreme Court set forth extremely explicit guidelines for the trial court to use in determining whether a witness who has been hypnotized may testify in a criminal prosecution about matters explored while under hypnosis.

Oftentimes preliminary matters will involve a determination of facts. In such instances, the judge is the trier of facts. *See* FRE 104, Advisory Committee Notes. When the judge hears evidence on these preliminary questions, he is not bound under Rule 104 to apply the rules of evidence. The one exception to this, which is explicitly stated, is the evidentiary law relating to privileges.

(b) Subdivision (b) refers to conditional relevancy. If before we determine X, we must determine that condition Y exists, then the court must admit evidence of the condition precedent. The evidence is admitted only after the judge makes an initial determination that a sufficient predicate has been laid. If later the judge believes that the condition was never fully established, he may withdraw the preliminary evidence from the jury's consideration. It is within the judge's discretion as to how the proof should be presented. *See* FRE 104, Advisory Committee Notes.

(c) Subdivision (c) is designed to prevent the jury from hearing what may be prejudicial evidence which may be later ruled inadmissible. Rather than exposing the jury to this evidence, the rule requires that the admissibility hearing be held outside the jury's presence. This procedure must always be followed in cases where the preliminary matter under discussion is the voluntariness of a criminal defendant's confession. This is in accord with long-standing Mississippi practice. *See, e.g., Hall v. State*, 427 So. 2d 957 (Miss. 1983); *McElroy v. State*, 204 So. 2d 463 (Miss. 1967); *see also Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L.Ed.2d 908 (1964). The admissibility of possibly illegally obtained evidence may be another matter to be considered outside the jury's presence. To protect the criminal defendant, the rule provides he may have a hearing outside the jury's presence at his request. In other cases, the judge's discretion governs. For instance, in determining the competency of a child to testify, the judge would most

likely not dismiss the jury. To dismiss the jury in such a case would be needlessly time-consuming.

(d) Subdivision (d) allows the defendant to challenge preliminary questions without exposing himself to a full cross-examination. Thus, if the defendant in a hearing to consider a motion to suppress evidence or in a hearing to consider the voluntariness of a confession testifies, the prosecutor on cross-examination may not inquire into other issues. This subdivision is necessary to provide a limitation on the wide-open cross-examination provision of Rule 611(b). Subdivision (d) does not address the issue of whether a defendant's testimony at a hearing on a preliminary matter may be used by the prosecutor at trial. *But see Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971).

(e) Subdivision (e) is self-explanatory. For a similar provision *see* FRE 104(e).

Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes

If the court admits evidence that is admissible against a party or for a purpose – but not against another party or for another purpose – the court, unless expressly waived or rebutted, shall restrict the evidence to its proper scope, contemporaneously instruct the jury accordingly, and give a written instruction if requested.

Advisory Committee Note

Rule 105 was amended while the restyling project was pending and has not been restyled.

Rule 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time.

Advisory Committee Note

The language of Rule 106 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule is a codification of the common law doctrine of completeness. The rule is already codified with regard to depositions in M.R.C.P. 32(a)(4). However, Rule 106 is somewhat narrower than Mississippi common law. The rule only applies the doctrine of completeness to written or recorded statements of a specific document. Under Mississippi case law the rule of completeness is extended to other writings and even to oral statements. *See Davis v. State*, 230 Miss. 183, 92 So. 2d 359 (1957); *Sanders v. State*, 237 Miss. 772, 115 So. 2d 145 (1969). Such a rule attempts to prevent misleading the jury by taking evidence out of context.

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Advisory Committee Note

The language of Rule 201 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Subdivision (a) has been reworded to underscore that Rule 201 does not cover the entire field of judicial notice. Rather, it governs only judicial notice of "adjudicative" facts – the facts of the particular case – not "legislative" facts. No Rule deals with judicial notice of legislative facts. The Rule has also been restructured, combining two subdivisions and reordering others. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

(a) The entire codification of the law of judicial notice is in Rule 201. Professor Kenneth Davis, in his now famous article, *"An Approach to Problems of Evidence in the Administrative Process,"* 65 Harv. L. Rev. 364 (1942), divided judicial notice into two parts, adjudicative and legislative. Adjudicative facts are easily understood; they are specific to the litigation. Legislative facts, on the other hand, are more amorphous. To determine legislative facts one must look at the public policy or policies involved in judge-made law. Despite the existence of two types of judicial notice, Rule 201 only governs judicial notice of adjudicative facts. A court's application of judicial notice of legislative facts is more an inherent part of the judicial process rather than an evidentiary matter.

(b) Subdivision (b) provides that only certain kinds of facts may be susceptible to judicial notice. The first kind of fact that can be judicially noticed is one that is commonly known in the jurisdiction in which the court sits. The judge himself need not know the fact. Indeed, it is altogether irrelevant whether he does. The test is whether the fact is common knowledge in the area. The use of judicial notice for matters of common knowledge has long been practiced in Mississippi. On what street the local department store is located is the kind of commonly known fact of which a court may take judicial notice. The second kind of fact susceptible to judicial notice is one readily ascertainable. This would include such items as maps, census data, mortality tables, dates and time, and history. *See* Ellis and Williams, *Miss. Evid.* § 12-2 and the cases cited therein. *See also Nicketta v. National Tea Co.*, 338 Ill. App. 159, 87 N.E.2d 30 (1949), and *Walls v. Mississippi State Bar*, 437 So. 2d 30, 33 (Miss. 1983).

Subdivision (b) does not allow judicial notice to be used when the fact is a dubious one or one in controversy.

(c) Subdivision (c) and (d) govern the use of the judicial discretion. The judge has discretion to take judicial notice of adjudicative facts, regardless of whether a party has requested him to do so. The basis for the exercise of such

discretion is to expedite matters. On occasion a judge may be required to take judicial notice. If a party makes a request and supplies the judge with the necessary information, he must take judicial notice.

(e) Subdivision (e) provides for a procedure not formerly required in Mississippi. By providing an opportunity for a hearing on the matter of judicial notice, the rule is a safeguard for fairness. If a party requests an opportunity to be heard, under the rule he must be granted that opportunity. Because frequently there is no advance notice that judicial notice will be taken, a party has a right to be heard even after judicial notice has been taken.

(f) Subdivision (f) contains an important deviation from pre-rule Mississippi practice. The common law rule in Mississippi had been that evidence admitted pursuant to judicial notice was not conclusive. Subdivision (f), insofar as it concerns criminal cases, is not inconsistent with that rule. However, in civil cases under subdivision (f) the jury must accept such evidence as conclusive. The jury in criminal cases may choose to accept the evidence or reject it. This avoids any possible allegation that the defendant's right to a jury trial under the Sixth Amendment was violated.

ARTICLE III. PRESUMPTIONS IN CIVIL CASES

Rule 301. Presumptions in Civil Cases Generally

In a civil case, unless a Mississippi statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Advisory Committee Note

The language of Rule 301 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 301 is only concerned with presumptions in civil proceedings. Once the party with the burden of proof has raised a presumption, a motion to dismiss by the opposing party will not be ordered. If the opposing party enters no evidence to rebut the presumption, then the court should instruct the jury that it may accept the presumption. The presumption does not disappear until credible or substantial evidence has been produced by the opposing party.

ARTICLE IV. RELEVANCE AND ITS LIMITS

Rule 401. Test for Relevant Evidence
Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the case.

Advisory Committee Note

The language of Rule 401 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The Rule has been restructured, adding subdivisions. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 401 makes no distinction between relevancy and materiality. The concept of materiality is merged into the concept of relevancy and retains no independent viability. Evidence is relevant if it is likely to affect the probability of a fact of consequence in the case. *Mississippi State Highway Commission v. Dixie Contractors, Inc.*, 375 So. 2d 1202, appeal after remand 402 So. 2d 811 (1979). If the evidence has any probative value at all, the rule favors its admission. Such has been the experience under Federal Rule of Evidence 401 which is identical to this rule. *Young v. Illinois Cent. Gulf R. Co.*, 618 F.2d 332 (5th Cir. 1980). Evidence to prove a collateral fact is relevant if the collateral fact has a tendency to prove or disprove an issue in the case. *American Potash & Chemical Corp. v. Nevins*, 163 So. 2d 224, 249 Miss. 450 (1964).

Rule 402. General Admissibility of Relevant Evidence
Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- the Mississippi Constitution; or
- these rules.

Irrelevant evidence is not admissible.

Advisory Committee Note

The language of Rule 402 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The Rule has been restructured, adding bullet points. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule introduces no new practice to existing Mississippi law. Relevant evidence may be rendered inadmissible for constitutional reasons or for reasons specified in Articles V and VI of these rules.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Advisory Committee Note

The language of Rule 403 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Relevant evidence may be inadmissible when its probative value is outweighed by its tendency to mislead, to confuse, or to prejudice the jury. If the introduction of the evidence would waste more time than its probative value was worth, then a trial judge may rightly exclude such otherwise relevant evidence. By providing for the exclusion of evidence whose probativeness is outweighed by prejudice, Mississippi is following existing federal and state practice. *U.S. v. Renfro*, 620 F.2d 497 (5th Cir. 1980), *cert. denied* 449 U.S. 921, 101 S. Ct. 321, 66 L. Ed. 2d 149 (1980). Such a rule also keeps collateral issues from being injected into the case. *Hannah v. State*, 336 So. 2d 1317 (Miss. 1976), *cert. denied*, 429 U.S. 1101, 97 S. Ct. 1126, 51 L. Ed. 2d 551 (1977); *Coleman v. State*, 198 Miss. 519, 23 So. 2d 404 (1945). This rule also gives the trial judge the discretion to exclude evidence which is merely cumulative. *Carr v. State*, 208 So. 2d 886 (Miss. 1968).

Rule 404. Character Evidence; Crimes or Other Acts

(a) Character Evidence.

(1) ***Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) ***Exceptions for a Defendant or Victim in a Criminal Case.*** The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; and

(C) the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) ***Exceptions for a Witness.*** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Uses.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Advisory Committee Note

The language of Rule 404 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The term "alleged" has been inserted before references to "victim" in subdivision (a), in order to provide consistency with Rule 412. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 404(a)(2) has been clarified to state more explicitly that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. This is consistent with the original intent of the Rule, which was to prohibit the circumstantial use of character evidence in civil cases, even where closely related to criminal charges. *See Ginter v. Northwestern Mut. Life Ins. Co.*, 576 F. Supp. 627, 629–30 (D. Ky. 1984) ("It seems beyond peradventure of doubt that the drafters of F.R.Evi. 404(a) explicitly intended that all character evidence, except where 'character is at issue' was to be

excluded" in civil cases.). This is in accord with the only Mississippi case to discuss the subject, *Walker v. Benz*, 914 So. 2d 1262 (Miss. Ct. App. 2005), which concluded that the defendant's character evidence would not be admissible under 404(a)(2) *even if* it applied by analogy in a civil assault case.

Nothing in the amendments to Rule 404(a) affect the scope of 404(b). The admissibility standards of Rule 404(b) remain fully applicable to both civil and criminal cases.

(a) Character evidence may arise in three different ways: (1) when character is an issue in a case; (2) when the character of a witness is impugned for lack of veracity; and (3) when the character of a party is being used as the basis for an inference that he behaved in the instant case as he did on prior occasions.

Character is straightforwardly introduced into evidence when it is a direct issue in the case. A defamation case exemplifies when character is a direct issue. *New Orleans Great Northern R. v. Frazer*, 158 Miss. 407, 130 So. 493 (1930).

With regard to character evidence relating to the veracity of witnesses, Rule 404 refers one to Rules 607, 608, and 609.

The difficulty surrounding character evidence is with regard to its inferential use. When a party attempts to prove that a person has a certain character trait and that he acted in accordance with it, the court will exclude the testimony. To do otherwise is to prejudice the person, to render him in the eyes of jurors liable, not because of what he did or did not do in the instant case, but because of what he has done or failed to do in the past. *Floyd v. State*, 166 Miss. 15, 148 So. 226 (1933); *Eubanks v. State*, 419 So. 2d 1330 (Miss. 1972); *Riley v. State*, 254 Miss. 86, 180 So. 2d 321 (1965). This particular kind of circumstantial evidence most often appears in criminal cases. The general rule serves as a bar to the introduction of the inferential evidence. *U.S. v. Cochran*, 546 F.2d 27 (5th Cir. 1977); *Davis v. State*, 431 So. 2d 468 (Miss. 1983).

Ordinarily a victim's character is irrelevant. The fact that a "bad" man rather than a "good" man was murdered or beaten is inconsequential. *Spivey v. State*, 58 Miss. 858 (1881). Under specific circumstances, however, the character of a victim may be relevant. This would most likely arise in instances where the defendant claims that the victim was the initial aggressor and that the defendant's actions were in the nature of self-defense. In order to prove this the defendant must offer evidence of an overt act perpetrated against him by the victim. *Freeman v. State*, 204 So. 2d 842 (Miss. 1967). Having proved the act, the defendant may then offer proof of the victim's character. *Shinall v. State*, 199 So. 2d 251 (Miss. 1967), *cert. denied* 389 U.S. 1014 [88 S. Ct. 590, 19 L. Ed. 2d 660] (1967),

outlined the permissible exceptions which would still be applicable under this rule. The recognized exceptions are: "(A) when, from the circumstances of the case, it is a part of the *res gestae*; . . . (B) where the evidence of the homicide is wholly circumstantial . . .; (C) where it is doubtful as to who the aggressor was at the time of the homicide . . .; or (D) where the immediate circumstances of the killing render it doubtful as to whether or not the act was justifiable."

(b) Against the general prohibition of producing evidence of prior offenses or actions to show that the party acted in conformity with past behavior, is posited a list of exceptions. These past acts introduced into evidence may be ones for which the person in question was either convicted or not convicted. All of the exceptions in Rule 404(b) have been recognized and applied on numerous occasions by the Mississippi Supreme Court. Evidence of another crime, for instance, is admissible where the offense in the instant case and in the past offense are so inter-connected as to be considered part of the same transaction. *Neal v. State*, 451 So. 2d 743 (Miss. 1984). The court has consistently recognized that evidence of a prior crime or act may be admitted to show identity, knowledge, intent, or motive. *Carter v. State*, 450 So. 2d 67 (Miss. 1984).

It should be noted that the exceptions listed in Subdivision (b) are not exclusive.

Rule 405. Methods of Proving Character

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Advisory Committee Note

The language of Rule 405 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Once the question of admissibility of character evidence is resolved under Rule 404, it is necessary to turn to Rule 405 for the correct methodology. Rule 405 provides two basic methods of proving character. One method, pursuant to Rule 405(b) is reserved for those cases in which character is an essential part of the issue. In this situation, proof of specific instances of conduct may be introduced into evidence. Evidence of specific conduct is limited to cases in which character is an issue.

405(a) provides the methods for proving character in cases in which character is an issue but more importantly in cases in which character evidence is being used inferentially. If permissible under Rule 404, the character evidence may be proved by opinion or reputation. Mississippi common law previously permitted such evidence to be introduced through reputation evidence. *Rogers v. State*, 204 Miss. 891, 36 So. 2d 155 (1948). Recognizing that reputation evidence is nothing more than the opinion of a selected group, Rule 405 broadens the methodology to allow proof of character by opinion.

While 405(a) limits proof of character to reputation or opinion evidence on direct examination, it does provide that the witness may be cross-examined regarding specific acts of conduct. There are two sound reasons for permitting this type of cross examination. If the witness on cross-examination professes no knowledge about specific acts, his qualifications to state opinion or reputation are impugned. If the witness admits knowledge of specific bad acts, then he has been impeached. *Magee v. State*, 198 Miss. 642, 22 So. 2d 245 (1945).

Rule 406. Habit; Routine Practice

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Advisory Committee Note

The language of Rule 406 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Habit is considered to be an individual's usual method or manner of doing things. Routine practice refers to a group or institution's habit. *See* McCormick, *Evidence*, 3rd Ed., 162. Thus, we speak of a person's habit and the routine practice

or custom of an institution. Mississippi has long recognized that under appropriate circumstances habit and custom are relevant evidence. Under Rule 406, evidence of habit or routine practice can be used as circumstantial evidence. A party may introduce evidence of a person's habit to imply that he probably acted in this instance in conformity with his habit.

In Mississippi under the common law such evidence would be inadmissible if there were no eyewitnesses. Rule 406 specifically provides to the contrary. *See* FRE 406, Advisory Committee Note.

The evidence that a business acted in conformity with its routine practice is relevant. Of course, rebuttal is always permitted.

Rule 407. Subsequent Remedial Measures

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or – if disputed – proving ownership, control, or the feasibility of precautionary measures.

Advisory Committee Note

The language of Rule 407 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The Rule has been restructured, adding a list of bullet points. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 407 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an

impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

This rule prohibits evidence of subsequent repairs to be introduced for the purpose of proving negligence or liability, including products liability. However, it may be admitted into evidence for another purpose. The second sentence of the rule discusses its limitations. The rule mentions ownership, control, feasibility and impeachment as admissible purposes, but this is not an exclusive list of permitted grounds, only an illustrative list.

The primary reason for this rule is a sound one. If such evidence were admissible on the issue of culpability, then the person responsible would have less incentive to correct the defect. By excluding subsequent repairs and remedies, the rule encourages the owner to render the property safer, or at least does not discourage repairs. The rule applies only to remedial changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant before the "event" causing "injury or harm" does not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. Courts applying Rule 407 have excluded evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees.

Rule 408. Compromise Offers and Negotiations

(a) Prohibited Uses. Evidence of the following is not admissible either to prove or disprove the validity or amount of a disputed claim:

(1) furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim.

(b) Exceptions.

(1) The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

(2) This rule does not apply to otherwise discoverable evidence presented during compromise negotiations.

Advisory Committee Note

The language of Rule 408 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The Rule has been restructured, adding subdivisions and additional paragraphs. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 408 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Reference to "liability" has been deleted, on the ground that the deletion makes the rule flow better and easier to read, and because "liability" is covered by the broader term "validity." Courts have not made substantive decisions on the basis of any distinction between validity and liability. No change in current practice or in the coverage of the rule is intended.

Evidence of an offer to compromise a claim is not receivable in evidence as an admission of either the validity or invalidity of the claim. The rule is based on two reasons. First, the evidence is irrelevant, since the offer may be motivated by a desire for peace rather than by a recognition of liability. Secondly, public policy favors the out-of-court compromises and settlement of disputes. The same policy underlines M.R.C.P. 48 which provides that evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

Pre-rule practice in Mississippi was similar to the rule with one significant difference. Under Rule 408 statements of admission facts made in negotiations are excluded from evidence. In Mississippi, an admission made in a settlement negotiation has been admissible against the declarant. *See McNeer & Dood v. Norfleet*, 113 Miss. 611, 74 So. 577 (1917).

Rule 408 only excludes offers when the purpose is proving the validity or invalidity of the claim or amount. Therefore, an offer for another purpose may well be admissible at trial.

Also, it is important to note that offers which are made in settlement negotiations are not necessarily excluded if they are otherwise discoverable.

Rule 409. Offers to Pay Medical and Similar Expenses
Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Advisory Committee Note

The language of Rule 409 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule fills a gap in Mississippi's evidence law. There exists no pre-rule Mississippi case on the relevance of offers by a defendant to pay plaintiff's medical expenses.

Rule 410. Pleas, Plea Discussions, and Related Statements
(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;
(2) a nolo contendere plea;
(3) a statement made during a proceeding on either of those pleas under a Mississippi statute or court rule; or
(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or
(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

Advisory Committee Note

The language of Rule 410 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The Rule has been restructured, adding subdivisions. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Under existing Mississippi law, a plea of *nolo contendere* by a defendant is not admissible against him later in either a civil case or a criminal case. *See Keys v. State*, 312 So. 2d 7 (Miss. 1975). (A plea of *nolo contendere* is only available in misdemeanor cases). Rule 410 is consistent with Mississippi law by rendering inadmissible both guilty pleas which are withdrawn and statements made in a judicial proceeding regarding a plea of guilty which is withdrawn or a plea of *nolo contendere*. *See Sanders v. State*, 435 So. 2d 1177 (Miss. 1983) and Rule 3.03(6), Uniform Criminal Rules of Circuit Court Practice.

The exceptions to this rule of inadmissibility are limited. The first exception covers situations in which the defendant testifies at trial that the prosecutor or police made a statement expressing doubt as to defendant's guilt. In such an instance, the state would be able to introduce the defendant's statement or plea to rebut his testimony.

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

Advisory Committee Note

The language of Rule 411 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an

impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

One of the primary reasons for excluding evidence of insurance or the lack of it is to prevent the jury from deciding the case on improper grounds. Rule 411 reflects existing Mississippi practice. Evidence of the existence of defendant's insurance is irrelevant as to his negligence and admission of such evidence may be grounds for a mistrial. *See Mid-Continent Aircraft Corp. v. Whitehead*, 357 So. 2d 122 (Miss. 1978); *Petermann v. Gray*, 210 Miss. 438, 49 So. 2d 828 (1951). Evidence of liability insurance may be relevant for other purposes, such as proof of agency, ownership, or bias.

Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition

(a) Prohibited Uses. The following is not admissible in a criminal case involving an alleged sexual offense:

(1) reputation or opinion evidence of a victim's past sexual behavior; and

(2) evidence of a victim's past sexual behavior other than reputation or opinion, except under subdivisions (b) and (c).

(b) Exceptions. The court may admit evidence of:

(1) specific instances of a victim's past sexual behavior:

(A) with a person other than the defendant, if offered by the defendant to prove that someone else was the source of semen, pregnancy, disease, or injury;

(B) with the defendant, if offered by the defendant to prove consent; and

(C) if constitutionally required to be admitted; and

(2) false allegations of sexual offenses made at any time before trial by the victim.

(c) Procedure to Determine Admissibility.

(1) Motion. A defendant who intends to offer evidence under subdivision (b) must:

(A) make a motion accompanied by an offer of proof describing the evidence;

(B) file the written motion and offer of proof at least 15 days before trial, unless the court sets a later time – including during trial – after determining:

(i) the evidence is newly discovered and with reasonable diligence could not have been discovered earlier; or

(ii) the issue is newly arisen; and

(C) serve all parties and the victim.

(2) Hearing and Order. When the offer of proof is sufficient, the evidence may be admitted only if the court:

(A) conducts a hearing in chambers to determine admissibility of the evidence;

(B) allows the parties to offer relevant evidence and call witnesses – including the victim – at the hearing;

(C) if the relevance of the evidence depends on whether a fact exists, determines – at this or a later hearing – whether the fact exists, notwithstanding Rule 104(b);

(D) finds that the probative value of relevant evidence outweighs the danger of unfair prejudice, except this subparagraph (D) does not apply when the evidence is offered under subparagraph (b)(1)(C); and

(E) makes an order that specifies:

(i) the admissible evidence; and

(ii) the areas about which the victim may be examined.

(d) Definitions. In this rule:

(1) "victim" includes an alleged victim; and

(2) "past sexual behavior" means sexual behavior other than the alleged offense.

Advisory Committee Note

The language of Rule 412 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The Rule has been restructured, employing additional paragraphs, subparagraphs, and items. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

(a) Subdivision (a) is designed to protect the privacy of the alleged victim by excluding opinion or reputation evidence of the victim's past sexual experience. This rule is applicable in all criminal cases in which a defendant is accused of a sexual offense against another person. This includes, but is not limited to, offenses prohibited by M.C.A. § 97-3-95.

(a) Subdivision (a) also excludes other evidence of the victim's past sexual experience with some exceptions in subdivision (b). Specific instances of sexual conduct are admissible to determine whether the defendant is the source of semen, pregnancy, disease or injury. Furthermore, specific instances of sexual conduct between the alleged victim and the defendant are relevant on the issue of consent.

(c) Subdivision (c) provides that notice be given if the defendant intends to offer evidence of specific instances of the alleged victim's sexual conduct. The

defendant does this by making a written motion to offer the evidence, which includes an offer of proof. The court then holds a hearing in chambers to decide the evidence's admissibility.

If otherwise admissible, nothing in this rule precludes evidence of past false allegations by the alleged victim of past sexual offenses. "Past false allegations" shall include any such allegations made prior to trial. This provision is intended to protect the defendant's Sixth Amendment rights.

Rule 412(a) and (b) adapts the language of Uniform Rule of Evidence 412. In its procedural requirements Rule 412 bears similarity to M.C.A. § 97-3-70 (repealed July 1, 1991), the Mississippi rape-shield law enacted in 1977. *See also* M.C.A. § 97-3-68; *Johnston v. State*, 376 So. 2d 1343 (Miss. 1979).

ARTICLE V. PRIVILEGES

Rule 501. Privileges Established by Constitution or Rule Only
Unless the federal or state constitution or these or other applicable rules provide otherwise, no person has a privilege to:

- refuse to be a witness;
- refuse to disclose any matter;
- refuse to produce an object or writing; or
- prevent another from being a witness, disclosing any matter, or producing an object or writing.

Advisory Committee Note

The language of Rule 501 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The Rule has been restructured, converting numbered paragraphs to a list of bullet points. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rules 501 through 505 are largely modeled on the draft version of the Federal Rules of Evidence which was originally approved by the United States Supreme Court. Before enacting the Federal Rules of Evidence, Congress deleted the rules concerning privilege on the ground that the rules invaded an area of state

law. The federal courts, however, often refer to these deleted rules, which are now labeled Federal Standards. Although they have no binding effect on the federal courts, they do serve as guidelines.

Rule 502. Lawyer-Client Privilege

(a) Definitions. In this rule:

(1) "Client" means a person, public officer, corporation, association, or any other public or private organization or entity:

(A) to whom a lawyer renders professional legal services; or

(B) who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) "Client's representative" means:

(A) one authorized to:

(i) obtain professional legal services on behalf of the client; or

(ii) act on behalf of the client on the legal advice rendered; or

(B) an employee of the client with information the lawyer needs to render legal services to the client.

(3) "Lawyer" means a person authorized – or who the client reasonably believes is authorized – to practice law in any state or nation.

(4) "Lawyer's representative" means one employed by the lawyer to assist the lawyer in rendering professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those:

(A) to whom disclosure is made to further rendition of professional legal services to the client; or

(B) reasonably necessary to transmit the communication.

(b) General Rule of Privilege. A client has a privilege to refuse to disclose – and to prevent others from disclosing – any confidential communication made to facilitate professional legal services to the client:

(1) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(2) between the client's lawyer and the lawyer's representative;

(3) by the client, the client's representative, the client's lawyer, or the lawyer's representative to another lawyer or that lawyer's representative, if:

(A) the other lawyer represents another party in a pending case; and

(B) the communication concerns a matter of common interest;

(4) between the client's representatives or between the client and a client representative; or

(5) among lawyers and their representatives representing the same client.

(c) Who May Claim the Privilege.

(1) The privilege may be claimed by:

(A) the client;

(B) the client's guardian or conservator;

(C) a deceased client's personal representative; or

(D) the successor, trustee, or similar representative of a corporate, associational, or other organizational client, whether in existence or not.

(2) The client's lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege, but only on the client's behalf.

(d) Exceptions. The privilege does not apply if:

(1) *Furtherance of Crime or Fraud.* The lawyer's services were sought or obtained to enable or aid anyone to plan or commit what the client knew – or reasonably should have known – was a crime or fraud;

(2) *Claimants Through Same Deceased Client.* The communication is relevant to an issue between parties who claim – by testate or intestate succession or by *inter vivos* transaction – through the same deceased client;

(3) *Breach of Duty.* The communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(4) *Document Attested by Lawyer.* The communication is relevant to an issue about an attested document to which the lawyer is an attesting witness; or

(5) *Joint Clients.* The communication:

(A) is offered in a case between or among clients who retained or consulted a lawyer in common;

(B) was made by any of the clients to the lawyer; and

(C) is relevant to a matter of common interest between two or more clients.

Advisory Committee Note

The language of Rule 502 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Subdivision (a) defines pertinent terms: who is a lawyer, who is a client, who are their representatives. These definitions clarify Mississippi law. The only existing statute relating to attorney-client relationship is M.C.A. § 73-3-37 which, among other things, includes a provision that one of an attorney's duties is "to maintain inviolate the confidence and, at every peril to themselves, to preserve the secrets of their clients. . . ."

The term "client" includes individuals, corporations and associations, and governmental bodies. Mississippi decisional law is in accord with Rule 502(a)(1) in that the privilege protects communications between an attorney and one who consults him with a view towards retaining him, but who eventually decides not to employ him. *See Perkins v. Guy*, 55 Miss. 153 (1877). The services provided by the attorney must be legal services in order to be cloaked with the privilege. Services which are strictly business or personal do not enjoy the privilege. *See* McCormick, *Evidence*, 92. The Mississippi court has not recognized the privilege in those cases in which the attorney is merely a scrivener. *Rogers v. State*, 266 So. 2d 10 (Miss. 1972).

Rule 502(a)(2) defines representatives of a client. This takes on particular significance in regards to corporate clients. This group of employees who may be a client's representatives is larger than the "control group". The "control group" was formerly one of the leading tests for determining which corporate employees had the benefit of the privilege. *See Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981), in which the Supreme Court construed the language of the Federal Rules of Evidence as invalidating the control group test and so rejected it.

The definition of lawyer in Rule 502(a)(3) covers any person licensed to practice law in any state or nation. It includes persons who are not lawyers but whom the client reasonably believes are lawyers.

The definition of representative of the lawyer in Rule 502(a)(4) is broadly designed to include the lawyer's employees and assistants. It also includes experts that the lawyer has hired to assist in the preparation of the case. It does not extend to an expert employed to be a witness. This conforms to existing Mississippi practice. *Dictum* in *Wilburn v. Williams*, 193 Miss. 831, 11 So. 2d 306 (1943), indicated that the court might have followed such a definition if the issue was before it.

A communication which takes place in the presence of a third party is not confidential unless it complies with the statement in Rule 502(a)(5). If the third party does not fall within these categories in this subdivision, his presence deems the communication not to be confidential. *See Taylor v. State*, 285 So. 2d 172 (Miss. 1973); *Ferrel v. State*, 208 Miss. 539, 45 So. 2d 127 (1950).

The test for confidentiality is intent. Thus, a communication made in public cannot be considered confidential. Intent can be inferred from the particular circumstances.

Subdivision (b) is a statement of the rule. The rule is drafted in such a way as to prevent eavesdroppers from testifying about the privileged communication. *See* the Advisory Committee Notes to Deleted FRE 503 [which is identical to U.R.E. 502(b)].

The privilege extends to statements made in multiple party cases in which different lawyers represent clients who have common interests. Each client has a privilege as to his own statements. The FRE Advisory Committee Notes to Deleted Rule 503 state that the rule is inapplicable in situations where there is no common interest to be promoted by a joint consultation or where the parties meet on a purely adversary basis.

Subdivision (b) provides that the privilege includes lawyer to client communications as well as client to lawyer communications. *See Barnes v. State*, 460 So. 2d 126, 131 (Miss. 1984).

Subdivision (c) establishes that the privilege belongs to the client or his personal representative. *Barnes v. State*, 460 So. 2d 126, 131 (Miss. 1984). The lawyer's claim is limited to one made on behalf of the client; he himself has no independent claim. *See United States v. Jones*, 517 F.2d 666 (5th Cir.1974).

Subdivision (d) excludes certain instances from the privilege. Rule 502(d)(1) does not extend the privilege to advice in aid of a future crime or fraud. The provision that the client knew or reasonably should have known of the criminal or fraudulent nature of the act is designed to protect the client who is mistakenly advised that a proposed action is lawful. *See* McCormick, *Evidence*, 75. Existing law in Mississippi on this point is unclear. Dicta in two 19th century cases suggest that the privilege did apply to protect statements regarding the client's motives in fraudulent schemes. *See Parkhurst v. McGraw*, 24 Miss. 134 (1852); *Lengsfield and Co. v. Richardson and May*, 52 Miss. 443 (1876). Additionally, the federal appellate court in *Hyde Construction Co. v. Koehring Co.*, 455 F.2d 337 (5th Cir. 1972), has determined that the Mississippi courts would allow the privilege when an attorney, acting as the client's alter ego, commits a tort or fraud. It is uncertain, if this is an accurate reflection of the scarce Mississippi law on the point, but clearly under Rule 502(d)(1) the privilege in such a case would not apply.

Rule 502(d)(2) permits no privilege when the adversaries in a case claim the privilege from the same deceased client. The general rule is that the privilege survives death and may be claimed by the deceased's representative. However, this rule makes no sense in some cases; for instance, in will contests when various parties claim to be the representative of the decedent. Only at the end of the

litigation will the court have determined who is the deceased's successor, and until it has made that determination, neither party is entitled to invoke the privilege.

Rule 502(d)(3) permits the use of statements made between a lawyer and his client when a controversy later develops between them, such as in a dispute over attorney's fees or legal malpractice.

Rule 503. Privilege between Patient and Physician or Psychotherapist

(a) Definitions. In this rule:

(1) "Patient" means a person who consults, is examined by, or is interviewed by a physician or psychotherapist;

(2) "Physician" means a person who is – or the patient reasonably believes to be – authorized to practice medicine in any state or nation;

(3) "Psychotherapist" means:

(A) a physician, or a person licensed or certified as a psychologist by any state or nation,

(B) while engaged in diagnosing or treating a mental or emotional condition, including alcohol or drug addiction.

(4) A communication is "confidential" if not intended to be disclosed to third persons, other than those:

(A) present to further the patient's interests in the consultation, examination, or interview;

(B) reasonably necessary to transmit the communication; or

(C) participating in the diagnosis or treatment under the physician's or psychotherapist's direction, including members of the patient's family.

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose, and to prevent others from disclosing:

(1) knowledge the physician or psychotherapist derived from the professional relationship with the patient; and

(2) confidential communications:

(A) made for the purpose of diagnosing or treating the patient's physical, mental, or emotional condition, including alcohol or drug addiction, and

(B) between or among the patient, the patient's physician or psychotherapist, and persons – including the patient's family – participating in the diagnosis or treatment under the direction of the physician or psychotherapist.

(c) Who may Claim the Privilege.

(1) The privilege may be claimed by:

(A) the patient;

(B) the patient's guardian or conservator; or

(C) a deceased patient's personal representative.

(2) The physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege, but only on the patient's behalf.

(d) Exceptions. The privilege does not apply:

(1) *Hospitalization Proceedings.* In proceedings to hospitalize the patient for mental illness, if the physician or psychotherapist has determined in the course of diagnosis or treatment that the patient needs to be hospitalized;

(2) *Court-Ordered Examination.* To any communication related to the purpose of a court order directing an examination of the physical, mental, or emotional condition of a patient who is a party or witness, unless the order states that the privilege applies;

(3) *Breach of Duty.* To an issue of breach of duty by the physician or psychotherapist to the patient or by the patient to the physician or psychotherapist; or

(4) *Children and Parents; Seal or Release Records.* To communications – including records – regarding a party's physical, mental, or emotional health or drug or alcohol condition when relevant to child custody, visitation, adoption, or termination of parental rights.

As to this paragraph (4), the court may order the records sealed or – after a hearing in chambers – order the relevant records released.

(e) *Waiver by Filing Case or Delivering Notice.* In a case or claim for professional services that were or should have been rendered, filing the case or delivering written notice of the claim waives the privilege.

(f) *Waiver by Pleadings; Ex Parte Contact.* A party whose pleadings place in issue any aspect of that party's physical, mental, or emotional condition thereby – and to that extent only – waives the privilege.

The exception in this subdivision (f) does not authorize *ex parte* contact by an opposing party.

Advisory Committee Note

The language of Rule 503 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. In Rule 503(a)(4)(C), "diagnosis or treatment" replaces "diagnosis and treatment," to conform to Mississippi law, including the statement of privilege in subdivision (b). These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Subdivision (a) defines the terms "patient," "physician," "psychotherapist," and "confidential communication." Existing Mississippi law is codified at M.C.A. § 13-1-21. The existing statute is broader than Rule 503(a) in that it extends the privilege to physicians, osteopaths, dentists, hospitals, nurses, pharmacists, podiatrists, optometrists, and chiropractors. M.C.A. § 73-31-29 extends the privilege to psychologists. Additionally, under existing Mississippi law no allowance has been made for an erroneous belief that the treating individual was a physician. Rules 503(a)(2) and (3) make such an allowance.

Rule 503(a)(4) is essentially a codification of existing state practice. It is compatible with the definition of "confidential communication" under Rule 502 (the attorney-client privilege.)

Rule 503(b) is a statement of the privilege rule. It, too, is compatible with the statement of the attorney-client privilege in Rule 502. The public policy protecting communications made about alcohol and drug addiction arises out of the current contemporary concern about these problems. By protecting these communications it is hoped that rehabilitation efforts will be encouraged.

Subdivision (c) is reflective of M.C.A. § 13-1-21. The privilege belongs to the patient, and only the patient can waive it.

Subdivision (d) excepts four instances from the privilege. The first exception concerns commitment proceedings. Existing law in Mississippi is structured so that such communications currently are not privileged. *See* M.C.A. § 41-21-67 et seq.

The second exception under subdivision (d) pertains to court-ordered physical or mental examinations. The exception is necessary for the effective utilization of this procedure. It is important to note that the exception is effective only with respect to the particular purpose for which the examination is ordered. No statement made by an accused in the course of an examination into competency to stand trial is admissible on the issue of guilt. *See also* Rule 4.08, Uniform Criminal Rules of Circuit Court Practice.

Under the third exception there is no privilege when a controversy develops between physician and patient, such as in a dispute over medical fees or medical malpractice.

Under subdivision (d)(4), when determining whether records are relevant to a custody, termination, or adoption action, some of the factors courts should consider include whether: (1) the treatment was recent enough to be relevant; (2)

substantive independent evidence of serious impairment exists; (3) sufficient evidence is unavailable elsewhere; (4) court ordered evaluations are an inadequate substitute; and (5) given the severity of the alleged disorder, communications made in the course of treatment are likely to be relevant.

Subdivision (e) is required by considerations of fairness and policy, and simply provides that the institution of a claim, either by delivery of written notice or by the filing of an action, operates to waive the privilege as to any medical information relevant to the claim.

The primary impact of subdivision (f) will be in personal injury actions, although the exception by its terms is not so limited. This subdivision, like the remainder of these rules, has no application outside the context of hearing or discovery processes in the Mississippi Rules of Civil Procedure and other rules of court. *See* Rules 101 and 1101. By virtue of this exception a party who seeks recovery of damages for a physical, mental or emotional injury waives the privilege for purposes of that action only and to the extent that he or she has put his or her physical, mental or emotional condition in issue by his or her pleadings. With respect to any aspect of the party's physical, mental or emotional condition not put in issue by his or her pleadings, the privilege remains in full force and effect. Rules of Evidence by their definition govern the admissibility of evidence at trial. Subdivision (f) is not a procedural rule and cannot be used as such.

Rule 504. Spousal Privilege

(a) Definition. A communication is "confidential" if a person makes it privately to the person's spouse and does not intend its disclosure to any other person.

(b) General Rule of Privilege. A person has a privilege to prevent the person's current or former spouse from testifying in a civil or criminal case about any confidential communication between them.

(c) Who may Claim the Privilege. Either spouse may claim the privilege. A spouse has authority to claim the privilege on the other spouse's behalf.

(d) Exceptions. The privilege does not apply:

- **(1)** in a civil case between the spouses; or
- **(2)** in a criminal case when one spouse is charged with a crime against:
  - **(A)** the person of a minor child; or
  - **(B)** the person or property of:
    - **(i)** the other spouse;
    - **(ii)** a resident of either spouse's household; or

(iii) a third person when committed during a crime against any person described in paragraphs (d)(1) and (2).

Advisory Committee Note

The language of Rule 504 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

There are two areas of law which govern if and when one spouse may testify against the other, spousal competency and marital privilege. M.C.A. § 13-1-5 governs matters of spousal competency. On the other hand, marital privilege protects certain communications made during the marriage. The privilege extends only to communications which were intended to be confidential. Thus, the presence of another person, even a family member, is deemed to mean that the communication was not intended to be confidential. Likewise, if the intent was that the communication would be confidential, a third party may not testify regarding the communication, even if that third party learned it from one of the spouses directly. Rule 504(a) is in accord with existing Mississippi practice.

Rule 505. Communications to Clergy

(a) Definitions. In this rule:

(1) "Clergy member" means a minister, priest, rabbi, or other similar functionary of a church, religious organization, or religious denomination.

(2) A communication is "confidential" when:

(A) made privately, and

(B) not intended to be disclosed except to further the purpose of the communication.

(b) General Rule of Privilege. A person has a privilege to refuse to disclose – and to prevent others from disclosing – a confidential communication made by the person to a clergy member as spiritual adviser.

(c) Who may Claim the Privilege.

(1) The privilege may be claimed by:

(A) the person who made the communication;

(B) the person's guardian or conservator; or

(C) a deceased person's personal representative.

(2) Unless the privilege is waived, the clergy member must claim it on the person's behalf.

(d) Clerical Staff. A clergy member's secretary, stenographer, or clerk must not be examined about any fact learned in that capacity without the clergy member's consent.

Advisory Committee Note

The language of Rule 505 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 505 is a restatement of M.C.A. § 13-1-22. The definition of a "clergyman" is broad but workable. It is fair to say that the term refers to clergy who are regularly engaged in activities of established denominations. It is not broad enough to include all sorts of "self-denominated ministers."

Rule 505, like M.C.A. § 13-1-22, cloaks the clergyman's secretary, stenographer, or clerk with the privilege should they, in their professional capacities, learn of the communication. The clergyman must consent before his employee may testify about the communication, but it would seem that his consent is meaningless if the penitent has not already waived the privilege.

ARTICLE VI. WITNESSES

Rule 601. Competency to Testify

(a) In General. Every person is competent to be a witness, except as provided in subdivisions (b) and (c).

(b) Competency of Spouse. If one spouse is a party, the other spouse may not testify as a witness in the case unless both consent, except:

- **(1)** when called as a witness by the spouse who is a party;
- **(2)** in a controversy between them; or
- **(3)** in a criminal case for:
  - **(A)** a criminal act against a child;
  - **(B)** contributing to the neglect or delinquency of a child;
  - **(C)** desertion or nonsupport of a child under 16; and
  - **(D)** abandonment of a child.

(c) Competency of Appraiser. When the court – as required by law – appoints a person to make an appraisal for the immediate possession of property in an eminent domain case:

(1) the appraiser may not testify as a witness in the trial of the case; and

(2) the appraiser's report is not admissible in evidence during the trial.

Advisory Committee Note

The language of Rule 601 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The Rule has been restructured, using an additional subdivision and more paragraphs and subparagraphs. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule sets out the special provisions which render certain persons incompetent to testify. As originally written Rule 601 excepted two classes from competency, spouses pursuant to M.C.A. § 13-1-5 and persons convicted of perjury or subornation of perjury pursuant to M.C.A. § 13-1-11. Rule 601 was subsequently amended in 1990 to delete statutory references. Subdivision (b) retains the substance of superseded M.C.A. § 13-1-5. Former subdivision (b) retained the substance of superceded M.C.A. § 13-1-11 as it pertained to persons convicted of perjury or subornation of perjury. In *Fuselier v. State*, 702 So. 2d 388, decided Oct. 23, 1997 the Mississippi Supreme Court amended the rule by abandoning the perjurer's incompetency rule, striking that subdivision from the rule. A witness previously convicted of perjury or subornation of perjury is now competent as a witness and the fact of such a prior conviction will be available for impeachment of the witness under Rule 609(a)(2). Subdivision (c) reflects the substance of a prior amendment to Rule 601 made by the Mississippi Supreme Court in *Hudspeth v. State Highway Commission of Mississippi*, 534 So. 2d 210 (Miss. 1988). The *Hudspeth* amendment excepted from competency court appointed experts in eminent domain proceedings. The *Hudspeth* amendment, which was made retroactive to January 1, 1986, specifically referred to the provisions of then existing M.C.A. § 11-27-89. Subdivision (c) reflects the substance of the *Hudspeth* amendment but deletes any statutory reference.

Rule 602. Need for Personal Knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Advisory Committee Note

The language of Rule 602 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 602 states existing practice. A person must have personal knowledge of the matter as opposed to a mere opinion, in order to testify. *See Dennis v. Prisock*, 221 So. 2d 706 (Miss. 1969); *Perkins v. State*, 290 So. 2d 697 (Miss. 1974). Normally the witness himself will supply the necessary foundation showing that he has personal knowledge. Rule 602 does not prevent, however, the witness from testifying about hearsay statements. He need only show that he has personal knowledge regarding the making of the statements. He cannot testify about the subject matter contained in the hearsay statement. When he is testifying with regard to hearsay statements, Rules 801 and 805 are applicable. *See* FRE 602, Advisory Committee Notes.

Rule 603. Oath or Affirmation to Testify Truthfully

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Advisory Committee Note

The language of Rule 603 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 603 is consistent with M.R.C.P. 43(d) which provides that an affirmation may be made in lieu of an oath. The policy behind allowing an affirmation in lieu of an oath is to refrain from offending religious persons who oppose oath-taking, atheists, and children who are too young to comprehend the meaning of an oath, among others. The affirmer as well as the oath-taker are equally subject to perjury charges under M.C.A. § 97-9-59.

Rule 604. Interpreter

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Advisory Committee Note

The language of Rule 604 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule should be read in conjunction with M.R.C.P. 43(f), M.C.A. § 99-17-7, and M.C.A. §§ 13-1-301 through 315.

Rule 605. Judge's Competency as a Witness
The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Advisory Committee Note

The language of Rule 605 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 606. Juror's Competency as a Witness
(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) During an Inquiry into the Validity of a Verdict or Indictment.
(1) ***Prohibited Testimony or Other Evidence.*** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
(2) ***Exceptions.*** A juror may testify about whether:
(A) extraneous prejudicial information was improperly brought to the jury's attention; or
(B) an outside influence was improperly brought to bear on any juror.

Advisory Committee Note

The language of Rule 606 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 606(a) disqualifies a juror from taking the witness stand during the trial of the case in which the juror is sitting. Of course, calling a juror as a witness will be rare; voir dire will generally expose a juror's knowledge of facts relevant to a case and result in disqualification of the juror for cause.

Rule 606(b) is designed to protect all "components of [a jury's] deliberations, including arguments, statements, discussions, mental and emotional reactions, votes and any other feature of the process." *See* FRE 606, Advisory Committee Notes. Thus testimony or affidavits of jurors is incompetent to show a compromise verdict, a quotient verdict, misinterpretation of instructions, and the like. *See, e.g., Hayes v. Entergy Mississippi, Inc.*, 871 So. 2d 743 (Miss. 2004) (pressure to reach a verdict); *Busick v. St. John*, 856 So. 2d 304 (Miss. 2003) (misinterpretation of instructions); *APAC-Mississippi, Inc. v. Goodman*, 803 So. 2d 1177 (Miss. 2002) (quotient verdict); *Curtis v. Bellwood Farms, Inc.*, 805 So. 2d 541 (Miss. Ct. App. 2000) (improper consideration of attorney's statements despite court's cautionary instruction); *Gavin v. State*, 767 So. 2d 1072 (Miss. Ct. App. 2000) (confusion regarding instructions); *Galloway v. State*, 735 So. 2d 1117 (Miss. Ct. App. 1999) (improper consideration of defendant's prior conviction). This broad rule of exclusion ensures jurors "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment." *See* FRE 606, Advisory Committee Notes.

Rule 606(b) does not purport to set forth the substantive grounds for setting aside verdicts because of an irregularity. Even when grounds are alleged to exist, there is a "general reluctance after verdict to haul in and probe jurors for potential instances of bias, misconduct or extraneous influences." *Gladney v. Clarksdale Beverage Co., Inc.*, 625 So. 2d 407, 418 (Miss. 1993) (discussing substantive grounds for setting aside a verdict). At the least, a party needs to show "a specific, non-speculative impropriety has occurred," and the trial court must supervise any post-trial investigation to "ensure that jurors are protected from harassment and to guard against inquiry into subjects beyond which a juror is competent to testify." *Id.* at 419. When jurors are permitted to testify about objective facts not of record and about outside influences, they may not be questioned about the effect upon them of what was improperly brought to their attention. *Id.*

In narrowly prescribed circumstances, Mississippi permits the correction of clerical errors in the verdict, notwithstanding Rule 606(b). *See Martin v. State*, 732 So. 2d 847, 851-55 (Miss. 1998) (Verdict incorrectly stated the defendant was guilty of possession of morphine when in fact the jury unanimously found the defendant not guilty. Such an allegation of clerical error did "not challenge the "validity" of the verdict or the deliberation or mental process of the jurors.") Of course, the possibility of clerical errors in the verdict form will be reduced substantially by polling the jury. Errors that come to light after polling the jury "may be corrected on the spot, or the jury may be sent out to continue deliberations, or, if necessary, a new trial may be ordered." C. Mueller & L. Kirkpatrick, *Evidence Under the Rules* at 671 (2d ed. 1999) (citing *Sincox v. United States*, 571 F.2d 876, 878-79 (5th Cir. 1978)).

Rule 607. Who May Impeach a Witness
Any party, including the party that called the witness, may attack the witness's credibility.

Advisory Committee Note

The language of Rule 607 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 607 is a repudiation of the old voucher rule. With regard to civil cases the voucher rule was previously eliminated by former M.R.C.P. 43(b)(4) which became effective January 1, 1982. Former M.R.C.P. 43(b)(4) has been abrogated by Rule 607. Rule 607 now repudiates the voucher rule in both civil and criminal cases.

Rule 608. A Witness's Character for Truthfulness or Untruthfulness
(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But

the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

Advisory Committee Note

The language of Rule 608 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 608's limitation of bad-act impeachment to "cross-examination" is trumped by Rule 607, which allows a party to impeach witnesses on direct examination. Courts have not relied on the term "on cross-examination" to limit impeachment that would otherwise be permissible under Rules 607 and 608. Therefore, no change to the language of the Rule was necessary in the context of a restyling project.

Rule 608 is concerned with character evidence of witnesses. Rule 404(a) prohibits the use of character evidence to prove conformity of conduct, but with some exceptions. Rule 608 addresses those exceptions. Thus, it is necessary to read both rules together.

Subdivision (a) permits the introduction of character evidence of a witness only after the witness's character for veracity has been attacked. A party may not bolster the character of the party's own witness; the party can only react in response to a charge of untruthfulness. Moreover, only the witness's character for truthfulness or its opposite can be attacked. Other character traits are irrelevant for impeachment purposes. Evidence shall be produced in the form of an opinion or reputation.

Subdivision (b) flatly prohibits impeaching a witness's character for truthfulness via *extrinsic proof* of specific acts of the witness's conduct, except criminal convictions pursuant to Rule 609. In contrast, specific instances of conduct of the witness may, in the discretion of the court, be inquired into on *cross-examination* of that witness (or on cross-examination of another who testifies concerning that witness's character for truthfulness) *if* probative of

truthfulness or untruthfulness. *See Brent v. State*, 632 So. 2d 936, 944 (Miss. 1994) ("If the past conduct did not involve lying, deceit, or dishonesty in some manner, it cannot be inquired into on cross-examination.")

This absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness's character for truthfulness. The admissibility of extrinsic evidence offered for other grounds of impeachment, such as contradiction, prior inconsistent statement, bias, and mental or sensory capacity, is governed by Rules 402, 403, and 616.

The extrinsic evidence prohibition of Rule 608(b) bars the use of any kind of evidence, including documents or the testimony of other witnesses, except a direct admission by the witness being cross-examined. *See Brent* at 945 ("a party cross-examining a witness about past instances of conduct is bound by the witness's answer [and] is not permitted to offer evidence in rebuttal to contradict it.")

Of course, counsel must have a good faith basis before beginning to inquire on cross-examination about specific instances of past conduct, and may not merely seek a "fishing license." *Brent*, 632 So. 2d at 645.

The last sentence of Rule 608 seeks to guarantee that a witness does not waive the privilege against self-incrimination when questioned about matters relating to credibility.

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

- **(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
  - **(A)** must be admitted, subject to Rule 403, when the witness is not a party; and
  - **(B)** must be admitted when the witness is a party, if the probative value of the evidence outweighs its prejudicial effect to that party; and
- **(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from

confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Advisory Committee Note

The language of Rule 609 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. By incorporating provisions from the Advisory Committee Note, Rule 609(a)(2) now tracks the language of the federal rule. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Under Rule 609(a) crimes are divided into two categories for purposes of impeachment. 609(a)(1) deals with felony convictions and under the original version treated convictions of all witnesses the same. The second category, 609(a)(2), originally addressed crimes involving dishonesty or false statement, whether felonies or misdemeanors.

Rule 609(a)(1) was amended in 2002 to incorporate the rationale of decisions by the Mississippi Supreme Court which recognized the difference in the highly prejudicial effect of showing the convictions when the witness is the accused and the little prejudicial effect from such impeachment of other witnesses. It was reasoned that when the impeachment by convictions is of a witness other than the accused in a criminal case there is little or no unfair prejudice which can be caused to a party. Thus, the probative value on the credibility of the witness will almost always outweigh any prejudice. In *White v. State*, 785 So. 2d 1059 (Miss. 2001) it was held that the accused had the right, bolstered by his right of confrontation, to impeach a state's witness with his felony drug conviction. In *Moore v. State*, 787 So. 2d 1282 (Miss. 2001) the court held that the state was properly permitted to impeach a defense witness with his five prior convictions, noting that there was no prejudice against the accused.

The amendments here refer to parties instead of the accused to clearly apply to civil cases, as did the original rule. Under this amended rule, convictions offered under 609(a)(1) to impeach a party must be analyzed under the guidelines set forth in *Peterson v. State*, 518 So. 2d 632 (Miss. 1987) to determine if the probative value is great enough to overcome the presumed prejudicial effect to that party, and findings should be made on the record by the judge. Convictions offered to impeach any other witness are admissible unless the court is persuaded by the opponent that the probative value is substantially outweighed by negative factors included in Rule 403. A record of the findings on the issue is not required in that case. *See Moore*, above.

Convictions from any state or federal jurisdiction may be considered for admission under the rule.

The phrase "dishonest act or false statement" in 609(a)(2) means crimes such as perjury or subornation of perjury, false statement, fraud, forgery, embezzlement, false pretense or other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the witness' propensity to testify truthfully. Such convictions are peculiarly probative of credibility and are always to be admitted, not subject to the discretionary balancing by the judge.

Rule 609(a)(2) requires that the proponent have ready proof that the crime was in the nature of *crimen falsi*. Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment – as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly – a proponent may offer information such as an indictment, a statement of admitted facts, or jury

instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. *Cf. Taylor v. United States*, 110 S. Ct. 2143 (1990) (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face); *Shepard v. United States*, 125 S. Ct. 1254 (2005) (the inquiry to determine whether a guilty plea to a crime defined by a nongeneric statute necessarily admitted elements of the generic offense was limited to the charging document's terms, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or a comparable judicial record). But the rule does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi*.

The reference in former 609(a) to proving a conviction during cross-examination is eliminated because the conviction may have to be proved in rebuttal if the witness refuses to admit the prior conviction on cross-examination.

The first sentence of 609(a) uses the term "character for truthfulness" instead of the prior term "credibility," because the limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subdivision (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

Subdivision (b) imposes a time limitation on prior convictions. If the conviction occurred more than ten years earlier, it may not be used as impeachment evidence. The rationale underlying subdivision (b) is based on fairness. A person's past should not be able to haunt the person for life. The judge may grant an exception in instances where the probativeness of the conviction substantially outweighs the prejudice. But, before the judge makes such a decision, the proponent must give the adversary sufficient notice so that the adversary may challenge the decision.

Prior to the rules Mississippi had no time limitation regarding prior convictions. The courts held only that the prior conviction should not be too remote in time from the case at bar. That principle obviously left a great deal of discretion with the trial judge in determining remoteness. Thus, the appellate court often upheld the use of prior convictions for impeachment which were far in excess of the ten-year limitation of Rule 609(b).

Subdivision (c) expresses the public policy that a person who has been rehabilitated or whose conviction has been nullified based on a later finding of his innocence should not be tainted by this conviction. Subdivision (c) does not apply to pardons which simply restore a person's civil rights. Rather, it is implicitly limited to cases in which rehabilitation has occurred or in which it can be shown that the person was innocent.

Subdivision (d) prohibits impeachment based on juvenile adjudications. Reasons for this rule include the wish to free an adult from bearing the burden of a youthful mistake, the informality of youth court proceedings, and the confidential nature of those proceedings. *See* FRE 609, Advisory Committee Notes.

In pre-rule Mississippi practice, the use of juvenile adjudications for impeachment purposes has been governed by M.C.A. § 43-21-561 which provides that no adjudication against a child shall be deemed a criminal conviction. Indeed, the juvenile offender is permitted by statute to deny the fact of the prior adjudication. However, the statute permits cross-examination by either the state or the defendant in a criminal action or the respondent in a juvenile adjudication proceeding regarding prior juvenile offenses for the limited purpose of showing bias and interest. In short, the evidence could be used in these limited circumstances but not to attack the general credibility of the witness.

Under Rule 609(d) the court has the discretion to allow impeachment of a witness, other than a criminal defendant, by a prior juvenile adjudication if the judge determines that it is necessary. The court's discretion extends only to witnesses other than the accused in a criminal case.

Subdivision (e) reflects the presumption that exists in favor of a trial court's decision. Until overturned, that decision is deemed to be the correct decision. Once the prior conviction has been introduced, the adversary can present evidence that an appeal of that conviction is pending. In theory, this gives a sense of balance to the use of the prior conviction. However, in practice, evidence of a pending appeal has insufficient weight to balance the use of the prior conviction.

Rule 610. Religious Beliefs or Opinions

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Advisory Committee Note

The language of Rule 610 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and

terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule prohibits impeaching a witness by questioning him concerning his religious beliefs and opinions. It does not prohibit questioning him as to those beliefs and opinions when testing his bias or interest.

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence
(a) Control by the Court; Purposes.
The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
(1) make those procedures effective for determining the truth;
(2) avoid wasting time; and
(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. The court may not limit cross-examination to the subject matter of the direct examination and matters affecting the witness's credibility.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:
(1) on cross-examination; and
(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Advisory Committee Note

The language of Rule 611 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Subdivision (a) is a verbatim restatement of M.R.C.P. 43(b)(1). Subdivision (a) gives the court the discretion to control the order of interrogation. The three principles underlying an orderly presentation of evidence are effectiveness in determining the issues, avoidance of needless waste of time, and protection of the witness from harassment and embarrassment. Subdivision (a) is designed in part to give the judge the discretion to determine whether presentation of the evidence

must be in question-and-answer form or whether it may be in narrative form. *See* FRE 611, Advisory Committee Notes.

Subdivision (b) reflects prior Mississippi practice. Subdivision (b) permits a wide-open cross-examination. In this respect Mississippi follows the English rule. *See* Weinstein's Evidence ¶¶ 611[02-03]. Under this wide-open cross-examination any matter may be probed that is relevant. Nonetheless, under Rule 611(a) the judge may still limit cross-examination to serve one of the purposes therein stated.

Rule 611(c) discusses the use of leading questions. It reflects common law practice. Leading questions as a general rule should not be used on direct examination since they suggest the answers the attorney wants from his own witness. This gives an unfair advantage to the party who is presenting his case. However, the judge has some discretion in allowing leading questions. Thus, leading questions are frequently used in developing preliminary matters. *See Seals v. St. Regis Paper Company*, 236 So. 2d 388 (Miss. 1970); *Thomas v. State*, 217 So. 2d 287 (Miss. 1969). When determining whether a child is competent to testify, a judge might also allow leading questions. *See Allen v. State*, 384 So. 2d 605 (Miss. 1980). Other instances may occur with the witness whose recollection is exhausted and with the witness who has communication difficulties.

The last sentence gives a party the right of cross-examination when questioning witnesses who are hostile or when questioning an adverse party or someone identified with an adverse party. The issue of who may be considered as "identified with an adverse party" was confronted in *Harris v. Buxton T.V., Inc.*, 460 So. 2d 828 (Miss. 1984).

The Advisory Committee is cognizant of the *Harris* decision but considers the interpretation and application of the phrase "identified with the adverse party" to be broader than that expressed in *Harris*.

Assuming the witness is deemed sufficiently "identified with an adverse party," the use of leading questions falls within the area of control by the judge over "the mode and order of interrogating witnesses. . . ." Accordingly, the last sentence of 611(c) is phrased in words of discretion rather than command.

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as, for example, the "cross-examination" of a party by his own counsel after being called

by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

Rule 612. Writing Used to Refresh a Witness's Memory

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing, recording, or object to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. An adverse party is entitled to have the writing, recording, or object produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing, recording, or object includes unrelated matter, the court must examine the writing, recording, or object in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver. If a writing, recording, or object is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or – if justice so requires – declare a mistrial.

Advisory Committee Note

The language of Rule 612 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The contents of the Rule – formerly contained in a single paragraph – have been divided into subdivisions. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 612, while reflecting existing federal practice, deviates in some respects from pre-rule Mississippi practice. The purpose of Rule 612 is to stimulate memory in order to ascertain credible evidence.

If the witness uses a writing, recording or object (e.g., a photograph) while testifying, the adversary has the right to see such writing, recording or object, to cross-examine on the basis of these items, and to have the relevant portions introduced into evidence. If, on the other hand, the witness uses such items to

refresh his memory before testifying, then it is within the trial court's discretion to allow the adversary to see them.

Additionally, the rule provides for an offer of proof when the trial court withholds certain portions of a writing, recording or object from the cross-examiner's use. The rule also provides sanctions for the occasions when such items are not produced pursuant to a court order.

The pre-rule Mississippi practice of using a writing to refresh a witness's memory has often been confused with the past recollection recorded exception to the hearsay rule. Prior to the rules, a party who simply wanted to refresh a witness's memory often felt compelled to satisfy the foundation requirements of the hearsay exception. Rule 612 eliminates this state of confusion and permits any writing, recording or object to be used, regardless of whether it is in compliance with the foundation requirements of the hearsay exception.

Rule 613. Witness's Prior Statement

(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Advisory Committee Note

The language of Rule 613 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Subdivision (a) abolishes the requirement that a cross-examiner, prior to questioning the witness about a prior statement in writing, must first show this writing to the witness. This requirement was developed in *The Queen's Case*, 2 Br. & B. 284, 129 Eng.Rep. 976 (1820). Although it was abolished in Britain and later in our federal courts, the rule lingered on in Mississippi.

This rule explicitly applies to both written and oral statements.

The provision allowing disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.

The rule does not defeat the application of Rule 1002 relating to the production of the original when the contents of a writing are sought to be proved. Nor does it defeat the application of M.R.C.P. 26(b)(3), entitling a person on request to a copy of his own statement, though the operation of the latter may be suspended temporarily.

Subdivision (b) preserves the foundation requirement in *The Queen's Case* with some modifications when impeachment is by extrinsic evidence. The traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine the statement, with no specification of any particular time or sequence. Under this procedure, several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement.

In order to allow for such eventualities as the witness becoming unavailable by the time the statement is discovered, a measure of discretion is conferred upon the judge.

The rule does not apply to impeachment by evidence of prior inconsistent conduct by virtue of the principles of *expression unius*. The use of inconsistent statements to impeach a hearsay declaration is treated in Rule 806.

Rule 614. Court's Calling or Examining a Witness

(a) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

(b) Examining. The court may examine a witness regardless of who calls the witness.

(c) Objections. A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

Advisory Committee Note

The language of Rule 614 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 614 is, in general, similar to Mississippi practice.

Subdivision (a) reflects the recognized authority of the trial judge to call witnesses. When the court calls its own witness, any party has the right to cross-examine that witness.

Subdivision (b) codifies the traditional authority, recognized in Mississippi and elsewhere, of the judge to interrogate the witness directly. The judge abuses this authority, however, when he abandons his judicial detachment and assumes an advocacy position. *See Jones v. State*, 223 Miss. 812, 79 So. 2d 273 (1955), appeal dismissed, *cert. denied*, 350 U.S. 869 [76 S. Ct. 116, 100 L. Ed. 770] (1955), rehearing denied, 350 U.S. 919 [76 S. Ct. 192, 100 L. Ed. 805 (1955); Rule 5.08, Uniform Criminal Rules of Circuit Court Practice. The appellate court can in such cases reverse for abuse of discretion. *See Breland v. State*, 180 Miss. 830, 178 So. 817 (1938).

The case of *Griffin v. Tate*, 171 Miss. 70, 156 So. 652 (1934), established guidelines for judicial interrogation which may be helpful in setting the parameters of subdivision (b). *Griffin* mentions by way of illustration some instances in which judicial interrogation would be appropriate: when a nervous witness needs to be calmed or is reluctant to testify or is confused as well as when the witness has important information which has not been elicited from him.

Subdivision (c) is an attempt to relieve counsel from the embarrassing position of objecting in the jury's presence to the judge's interrogation. It allows, moreover, sufficient time for counsel to make the objections in time for corrective measures.

Rule 615. Excluding Witnesses

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; or

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense.

Advisory Committee Note

The language of Rule 615 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Lower-case lettered subdivisions have replaced numbered paragraphs as first-level formatting. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing falsification, inaccuracy, and collusion. The rule of sequestration, or simply "the rule" as it has been known in Mississippi, has a time-honored tradition in state trial practice. Prior to these Rules, *Reagan Equipment Co. v. Vaughn Gin Co.*, 425 So. 2d 1045 (Miss. 1983), provided guidance for implementation of "the rule."

Under Rule 615 exceptions are made for several categories of witnesses. First, parties are excepted because their exclusion would raise serious problems of confrontation and due process. Secondly, as the equivalent of the right of a natural-person party to be present, a party that is not a natural person is entitled to have a representative present. The third category includes a person such as an agent who handled the transaction being litigated, an expert needed to advise counsel during the litigation, or an expert witness who must hear the testimony of other witnesses in order to form an opinion which he will later state testimonially. *Collins v. State*, 361 So. 2d 333 (Miss. 1978), provides guidance for permitting an expert to remain in the courtroom. In each instance the person's presence must be "shown by a party to be essential to the presentation of his case."

The sequestration may arise from a motion of a party or from the court on its own motion. This differs from pre-rule Mississippi practice in which a judge would not invoke the rule unless requested.

This rule differs from former Mississippi practice whereunder a party could be excluded during his case-in-chief only after he had the choice of testifying before his other witnesses. Under this rule, a party may remain in the courtroom at all times.

This rule does not discuss sanctions for violation of the sequestration order. Under existing Mississippi law the court has the discretion to exclude the offending witness from testifying. *See Johnson v. State*, 346 So. 2d 927 (Miss. 1977). The trial judge should not permit a witness who has violated the rule to testify unless he has first determined that the adversary would not be prejudiced by the violation of the rule. Other available remedies might be to strike the testimony of a witness who violated the rule, cite the witness for contempt, or allow a "full-bore" cross-examination. *See Douglas v. State*, 525 So. 2d 1312 (Miss. 1988).

Rule 616. Witness's Bias

Evidence of a witness's bias, prejudice, or interest – for or against any party – is admissible to attack the witness's credibility.

Advisory Committee Note

The language of Rule 616 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The common law permitted inquiry into a witness's bias, prejudice, or interest in a case for credibility purposes. *See* Ellis & Williams, *Mississippi Evidence*, § 4-4. The Mississippi Rules of Evidence did not originally include a rule permitting examination of a witness's bias, prejudice, or interest. Despite a similar omission in the Federal Rules of Evidence, the United States Supreme Court reaffirmed the common law use of impeachment by bias, prejudice, or interest in *United States v. Abel*, 469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984). MRE 616 codifies this longstanding principle in Mississippi as well as the holding in *United States v. Abel*. MRE 616 tracks the language of Uniform Rule of Evidence 616.

Rule 617. Taking Testimony of a Child by Closed Circuit Television

(a) Grounds. On the motion of a person named in subdivision (b), or on its own, the court may order that a child's testimony be taken outside the courtroom and shown in the courtroom by means of closed-circuit television if the court determines that:

(1) the child is under the age of 16 years;

(2) the testimony is that an unlawful sexual act, contact, intrusion, penetration, or other sexual offense was committed on the child; and

(3) there is a substantial likelihood that the child will suffer traumatic emotional or mental distress if compelled to testify:

(A) in open court; and

(B) in a criminal case, in the presence of the accused.

(b) Procedure on the Motion.

(1) ***Motion***. The motion may be filed by:

(A) the child;

(B) the child's attorney, parent, legal guardian, or guardian *ad litem*;

(C) the prosecutor; or

(D) any party.

(2) ***Hearing and Order.*** In ruling on the motion, the court must:

(A) conduct a hearing *in camera*; and

(B) make specific findings of fact, on the record, as to the basis of the ruling.

(c) Taking Testimony.

(1) ***Methods.*** Closed-circuit television testimony may be taken by any method for taking testimony outside the courtroom and showing it in the courtroom that is not inconsistent with the Confrontation Clauses of the United States and Mississippi Constitutions or applicable rules adopted by the Mississippi Supreme Court.

(2) ***Counsel.*** All parties must be represented by counsel when testimony is taken.

(3) ***Criminal Case.*** If the conditions in subdivision (a) are met in a criminal case, the court may exclude the defendant from the room where the testimony is taken if:

(A) an appropriate private electronic or telephonic device enables the defense attorney to be in continual contact with the defendant; and

(B) the defendant, the court, and the jury can observe the demeanor of the child witness.

(4) ***Expert Assistance.*** If the parties agree, the court may appoint a person to aid in formulating methods of questioning the child and to assist the court in interpreting the child's answers. The person appointed must be a child sexual abuse expert who has dealt with the child in a therapeutic setting concerning the offense or act.

(d) Identifying the Defendant. When the child is asked to identify the defendant, both may be present in the courtroom simultaneously.

Advisory Committee Note

The language of Rule 617 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and

terminology consistent throughout the rules. The Rule has been restructured, using fewer subdivisions in favor of additional paragraphs and subparagraphs. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule provides an exceptional procedure for the taking of testimony from children said to have been the victims of sexual abuse. If this rule is applied in a criminal case, the rights of the defendant under the Confrontation Clauses of Federal and State Constitutions must be respected. *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990); *Coy v. Iowa*, 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988).

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses
If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Advisory Committee Note

The language of Rule 701 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

All reference to an "inference" has been deleted, on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

The traditional rule regarding lay opinions has been, with some exceptions, to exclude them from evidence. Rule 701 is a departure from the traditional rule. It

favors the admission of lay opinions when two considerations are met. The first consideration is the familiar requirement of first-hand knowledge or observation. The second consideration is that the witness's opinion must be helpful in resolving the issues. Rule 701, thus, provides flexibility when a witness has difficulty in expressing the witness's thoughts in language which does not reflect an opinion. Rule 701 is based on the recognition that there is often too thin a line between fact and opinion to determine which is which.

The 2003 amendment of Rule 701 makes it clear that the provision for lay opinion is not an avenue for admission of testimony based on scientific, technical or specialized knowledge which must be admitted only under the strictures of Rule 702.

Rule 702. Testimony by Expert Witnesses
A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Advisory Committee Note

The language of Rule 702 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Lower-case lettered subdivisions have replaced numbered paragraphs as first-level formatting. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The use of the hypothetical question has been justly criticized. Rule 702 permits an expert to testify by giving an opinion or any other form of testimony, such as an exposition. Rule 702 seeks to encourage the use of expert testimony in non-opinion form when counsel believes the trier can draw the requisite inference. The rule, however, does not abolish the use of opinions. As the Federal Rules Advisory Committee Note pointed out, it will still be possible for an expert to take

the next step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts.

As has long been the practice in Mississippi, Rule 702 recognizes that one may qualify as an expert in many fields in addition to science or medicine, such as real estate, cotton brokering, auto mechanics or plumbing. *Boggs v. Eaton*, 379 So. 2d 520 (1980); *Early-Gary, Inc. v. Walters*, 294 So. 2d 181 (Miss. 1974); *Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 317 So. 2d 47 (Miss. 1975). Rule 702 is the standard for the admission of expert testimony from such other fields as well as for scientific testimony. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

By the 2003 amendment of Rule 702, the Supreme Court clearly recognizes the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable. This follows the 2000 adoption of a like amendment to Fed. R. Evid., 702 adopted in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). It is important to note that Rule 702 does not relax the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge, and that the factors mentioned in *Daubert* do not constitute an exclusive list of those to be considered in making the determination; *Daubert*'s "list of factors was meant to be helpful, not definitive." *Kumho*, 526 U.S. at 151. *See also Pepitone v. Biomatrix, Inc.* 288 F. 3d 239 (5th Cir. 2002).

Rule 703. Bases of an Expert's Opinion Testimony
An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible.

Advisory Committee Note

The language of Rule 703 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

All reference to an "inference" has been deleted, on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive

decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

There are three possible sources which may produce an expert's facts or data. Practice in Mississippi already recognizes two of them: (1) where the expert bases his opinion on personal observation, and (2) where he bases it either on a hypothetical question presented to him at trial or on the trial testimony of others which the expert has heard while sitting in the courtroom. *See Collins v. State*, 361 So. 2d 333 (Miss. 1978). The new practice under Rule 703 brings a third source: the presentation of data to the expert outside of court and other than by his personal observation. The Advisory Committee Note to FRE 703 presents a persuasive rationale for the use of the third source. A physician, for example, bases his medical diagnosis of his patient on many sources. Most of his sources are admissible in evidence but only with the expenditure of substantial time in producing and examining various authenticating witnesses. Since these sources provide the doctor with information that he utilizes in making life-and-death decisions, his validation of them ought to be sufficient for trial, especially since he can be cross-examined.

Rule 704. Opinion on an Ultimate Issue
An opinion is not objectionable just because it embraces an ultimate issue.

Advisory Committee Note

The language of Rule 704 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

All reference to an "inference" has been deleted, on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 704 abolishes the "ultimate issue rule" which existed in pre-rule Mississippi practice. The ultimate issue rule was often unnecessarily restrictive and generally difficult to apply. More often than not the invocation of the rule served to deprive the trier of fact of useful information. Rule 704 clarifies much of the confusion over the ultimate issue rule. An opinion is no longer objectionable solely on grounds that it "invades the province of the jury."

The abolition of the ultimate issue rule does not result in the admission of all opinions. It is an absolute requirement under Rules 701 and 702 that opinions must be helpful to a determination of the case before they are admissible. Furthermore, under Rule 403 evidence is excluded which wastes time. A question may not be asked which is based on inadequately explored legal criteria since the answer would not be helpful. As the FRE Advisory Committee Note to FRE 705 indicates, the question in a will contest, "Did the testator have the capacity to make a will" is still not permitted, whereas the question, "Did the testator have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution" would be. The former question is not helpful; the latter is.

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion
Unless the court orders otherwise, an expert may state an opinion – and give the reasons for it – without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Advisory Committee Note

The language of Rule 705 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

All reference to an "inference" has been deleted, on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 705 is an attempt to eliminate the use of the hypothetical question or, at the least, reduce its use. The almost universal criticism of the hypothetical question is that it is unduly complex and time-consuming. While dispensing with the requirement of preliminary disclosure at the trial of underlying facts or data, Rule 705 nonetheless offers two protections. The court may, in its discretion, require disclosure. Regardless of whether it does, the expert may still be required to state the underlying facts on cross-examination.

Rule 706. Court-Appointed Expert Witnesses

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs – and the compensation is then charged like other costs.

(d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts.

(f) Certain Eminent Domain Cases. Subdivisions (a)-(d) do not apply to an appraiser whom a court appoints – as required by law – for an immediate possession claim in an eminent domain case.

Advisory Committee Note

The language of Rule 706 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The provisions regarding the appointment process and the expert's role – formerly combined in a single subdivision – now appear in separate subdivisions (a) and (b). These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The essence of Rule 706 is contained in subdivision (a). Subdivision (a) provides specifically for the appointment of an expert either on the motion of a party or on the judge's own motion. It also provides for input by the parties into the selection process. Under the rule, the court-appointed expert may be deposed. Any party, including the party calling the expert, may cross-examine him. This rule was amended in 1988 in *Hudspeth v. State Highway Commission of Mississippi*, 534 So. 2d 210 (Miss. 1988), to be consistent with the provisions of then existing M.C.A. § 11-27-89 which provided that court appointed experts would not be compelled to testify. The amendment was made retroactive to January 1, 1986, the effective date of the Mississippi Rules of Evidence. Subsequent to the *Hudspeth* amendment, Rule 706(f) was amended to retain the substance of Rule 706(f) as originally approved by the Court in *Hudspeth* while deleting any reference to and dependence upon a specific statutory provision.

ARTICLE VIII. HEARSAY

A witness's testimony is evaluated on the basis of four factors: perception, memory, narration, and sincerity. In order that the testimony can be properly considered in the light of these factors, the testimony should comply with three conditions. The witness should testify (1) under oath, (2) in the presence of the trier of fact, and (3) be subjected to cross-examination. Past experience as well as common sense indicate that some testimony which does not conform to these three conditions may be more valuable than testimony that does. The four factors may, in some instances, be present in the absence of compliance with the three aforementioned conditions. The solution that the common law developed over a period of time was a general rule against hearsay which permitted exceptions which furnished guarantees of trustworthiness and reliability.

The hearsay provisions of the uniform rules retain the common law scheme. The traditional common law hearsay exceptions have been retained in Rules 803 and 804. Rule 803 concerns itself with situations where availability of the declarant is immaterial. Rule 804 pertains to exceptions which are usable only where the declarant is unavailable. The concluding provisions of both Rule 803 and 804 (Rule 803(24) and Rule 804(b)(5) respectively) allow for the use of hearsay statements which do not fall within the recognized exceptions, when the guarantees of trustworthiness and necessity are present. These two provisions are a recognition that the law is not stagnant; they are designed to encourage the development of this area of the law.

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay
(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:
(1) the declarant does not make while testifying at the current trial or hearing; and
(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(C) identifies a person as someone the declarant perceived earlier.
(2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and:
(A) was made by the party in an individual or representative capacity;
(B) is one the party manifested that it adopted or believed to be true;
(C) was made by a person whom the party authorized to make a statement on the subject;
(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
(E) was made by the party's coconspirator during and in furtherance of the conspiracy.
The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Advisory Committee Note

The language of Rule 801 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Statements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense – a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exclusion is intended.

Subdivision (a) defines with clarity the concept of a statement. The significant point is that nothing is an assertion unless intended to be one. This becomes particularly important in situations which deal with nonverbal conduct. Some nonverbal conduct is clearly tantamount to a verbal assertion, e.g., pointing to someone to identify that person. The definition of statement excludes nonverbal conduct which is not assertive. Thus, the definition of hearsay in Rule 801(c) concerns itself with conduct that is assertive.

When evidence of conduct is offered on the basis that the conduct was not a statement and, therefore, not hearsay, the trial judge must make a preliminary determination to ascertain whether an assertion was intended by the conduct. The burden is upon the party claiming that the intention existed.

Subdivision (c) codifies and simultaneously clarifies the common law definition of hearsay. If the significance of a statement is simply that it was made and there is no issue about the truth of the matter asserted, then the statement is not hearsay.

Under this definition of hearsay an out-of-court statement made and repeated by a witness testifying at trial is hearsay. The key is whether the statement is made while testifying or whether it is out-of-court. An out-of court statement otherwise hearsay is technically no less hearsay because it was made in the presence of a party.

Subdivision 801(d) has two major parts and both are departures from past Mississippi practice. The purpose of subdivision (d) is to exclude statements which literally fall within the definition of hearsay from the hearsay rule.

Subdivision 801(d)(1) is concerned with prior statements of the witness. In three specific instances, a witness's prior statement is not hearsay.

Prior inconsistent statements have generally been admissible for impeachment purposes but not admissible as substantive evidence. *Moffett v.*

State, 456 So. 2d 714, 719 (Miss. 1984). This has been the traditional practice in Mississippi. Under Rule 801(d)(1)(A) the prior inconsistent statements may be admissible as substantive evidence if they were made under oath, e.g., at a deposition or at a judicial proceeding. This covers statements made before a grand jury. There is no requirement that the prior statement be written. If the defendant in a criminal trial has made a prior inconsistent statement, the situation is governed by Rule 801(d)(2).

Rule 801(d)(1)(B) provides that prior consistent statements may be introduced for substantive evidence when offered to rebut a charge against the witness of recent fabrication.

Rule 801(d)(1)(C), which declares that prior statements of identification made by a witness are not hearsay, is not a departure from pre-rule practice. The Court in *Fells v. State*, 345 So. 2d 618 (Miss. 1977), departed from the traditional view that such statements were hearsay by adopting what was then the minority view that statements of identification could be admitted as substantive evidence of that identification. The scope of the rule is broader than the *Fells* holding in that: (1) there is no need for a prior attempt to impeach the witness for the identifying statement to be admissible; (2) the testimony about the prior statement may be from the witness who made it or another person who heard it; (3) the witness who made the statement need not make an in-court identification; and (4) the statement may have been made either in or apart from an investigative procedure. Statements physically describing a person are not statements of identification under this rule. The Confrontation Clause is not violated when a third party testifies about an out-of-court identification made by a witness who is unable to recall or unwilling to testify about that identification, provided the identifying witness testifies at the trial or hearing and is subject to cross-examination. *U.S. v. Owens*, 484 U.S. 554, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988).

Rule 801(d)(2) deals with admissions made by a party-opponent other than admissions made pursuant to M.R.C.P. 36(b). Admissibility of admissions made pursuant to M.R.C.P. 36(b) is controlled by that rule and is not affected by Rule 801(d)(2). The practice has been in Mississippi to treat an admission as an exception to the hearsay rule. Rule 801(d)(2) achieves the same result of admissibility although it classifies admissions as non-hearsay. There are five classes of statements which fall under the rule:

(A) A party's own statement is the classic example of an admission. If he has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required. It is only necessary that the statement be relevant to representative affairs.

(B) If a party adopts or acquiesces in another person's statement, it will be deemed that the statement is indeed his admission. Knowledge is not a necessary ingredient. *Matthews v. Carpenter*, 231 Miss. 677, 97 So. 2d 522 (1957); *Haver v. Hinson*, 385 So. 2d 606 (Miss. 1980). This raises the question of when silence is a form of admission. Silence may constitute a tacit admission if a person would have, under the circumstances, protested the statement made in his presence if the statement were untrue. In civil cases, this does not pose a significant problem. In criminal cases, much may depend on the person's constitutional right not to incriminate himself.

(C) The general principle survives that a statement by an agent authorized to speak by a party is tantamount to an admission by a party. The rule covers statements made by the agent to third persons as well as statements made by the agent to the principal. The essence of this is that a party's own records are admissible against him, even where there has been no intent to disclose the information therein to third persons.

(D) The common law required that the agent's statement be uttered as part of his duties, i.e., within the scope of his agency. 801(d)(2)(D) regards this rigid requirement and admits a statement "concerning a matter within the scope of his agency" provided it was uttered during the existence of the employment relationship.

(E) This subparagraph codifies the principle that only those statements of co-conspirators will be admissible which were made (1) during the conspiracy and (2) in furtherance of it. This is consistent with the United States Supreme Court's ruling in *Krulewitch v. United States*, 336 U.S. 440, 69 S. Ct. 716, 93 L .Ed. 709 (1949), which deemed inadmissible statements made after the conspiracy's objectives had either succeeded or failed.

Rule 801(d)(2) provides that the court shall consider the contents of the declarant's statement in resolving preliminary questions relating to a declarant's authority under subparagraph (C), the agency or employment relationship and scope thereof under subparagraph (D), and the existence of a conspiracy and the identity of the participants therein under subparagraph (E). Generally, foundational facts are governed by Rule 104, not the law of agency. *See Bourjaily v. United States*, 107 S. Ct. 2775 (1987). Under Rule 104(a), these preliminary questions are to be established by a preponderance of the evidence. Of course, in determining preliminary questions, the court may give the contents of the statement as much (or as little) weight as the court in its discretion deems appropriate. Moreover, Rule 801(d)(2) provides that the contents of the statement do not alone suffice to establish the preliminary questions. Rather, the court must

in addition consider the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, and evidence corroborating the contents of the statement. *See Ponthieux v. State*, 532 So. 2d 1239, 1244 (Miss. 1988) ("on appeal ... [w]e search the entire record to determine whether the preliminary fact has been established"); *Martin v. State*, 609 So. 2d 435 (Miss. 1992).

Rule 802. The Rule Against Hearsay
Hearsay is not admissible except as provided by law. The words "as provided by law" include other rules prescribed by the Mississippi Supreme Court."

Advisory Committee Note

The language of Rule 802 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 802 is a statement of existing common law.

Rule 803. Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant Is Available as a Witness
The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) ***Statement Made for Medical Diagnosis or Treatment.*** A statement that:

(A) is made to any person at any time for – and is reasonably pertinent to – medical diagnosis or treatment;

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause; and

(C) is supported by circumstances that substantially indicate its trustworthiness.

In this paragraph, "medical" includes emotional, mental, and physical health.

(5) ***Recorded Recollection.*** A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by – or from information transmitted by – someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11); and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) ***Public Records.*** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law enforcement personnel; or

(iii) in a civil case or against the prosecution in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

(9) ***Public Records of Vital Statistics.*** A record of a vital statistic, if reported to a public office in accordance with a legal duty.

(10) ***Absence of a Public Record.*** Testimony – or a certification under Rule 902 – that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) ***Records of Religious Organizations Concerning Personal or Family History.*** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) ***Certificates of Marriage, Baptism, and Similar Ceremonies.*** A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) ***Family Records.*** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) ***Records of Documents That Affect an Interest in Property.*** The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) ***Statements in Documents That Affect an Interest in Property.*** A statement contained in a document that purports to establish or affect an interest in property

if the matter stated was relevant to the document's purpose – unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established.

(17) ***Market Reports and Similar Commercial Publications.*** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) ***Statements in Learned Treatises, Periodicals, or Pamphlets.*** A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit. A treatise used in direct examination must be disclosed to an opposing party without charge in discovery.

(19) ***Reputation Concerning Personal or Family History.*** A reputation among a person's family by blood, adoption, or marriage – or among a person's associates or in the community – concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) ***Reputation Concerning Boundaries or General History.*** A reputation in a community – arising before the controversy – concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) ***Reputation Concerning Character.*** A reputation among a person's associates or in the community concerning the person's character.

(22) ***Judgment of a Previous Conviction.*** Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) ***Judgments Involving Personal, Family, or General History, or a Boundary.*** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) ***Other Exceptions.*** A statement not specifically covered by this Rule if:

(A) the statement has equivalent circumstantial guarantees of trustworthiness;

(B) it is offered as evidence of a material fact;

(C) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;

(D) admitting it will best serve the purposes of these rules and the interests of justice; and

(E) before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

(25) Tender Years Exception. A statement by a child of tender years describing any act of sexual contact with or by another is admissible if:

(A) the court – after a hearing outside the jury's presence – determines that the statement's time, content, and circumstances provide substantial indicia of reliability; and

(B) the child either:

(i) testifies; or

(ii) is unavailable as a witness, and other evidence corroborates the act.

Advisory Committee Note

The language of Rule 803 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. As before, Rule 803 uses numbered paragraphs as first-level formatting, rather than typical lower-case lettered subdivisions, because changing the structure of the Rule would disrupt electronic search results and thus impose transaction costs that outweigh any benefit in strictly consistent formatting. Rules 803(5)-(10) are simplified by using 'record," defined in Rule 101(b)(3)-(4). In Rule 803(8), "prosecution" has replaced "state" to conform with Rule 1101(a), which provides that the Evidence Rules apply to all cases and proceedings, including those where the State is not the prosecuting authority, such as those brought in the name of a municipality. These changes are

intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 803 provides that the hearsay rule does not exclude certain kinds of statements regardless of whether the declarant is available to testify. The rule explicitly does not state that the exceptions therein are admissible. The rationale for this is to put the parties on notice that, while the hearsay hurdle may not exist, other reasons may be present which justify the exclusion of the evidence. Rule 803 collects the vast majority of the recognized hearsay exceptions.

(1) Present Sense Impression. This exception is a new addition in Mississippi. It is based on the theory that the contemporaneous occurrence of the event and the statement render it unlikely that the declarant made a deliberate or conscious misrepresentation. Precise contemporaneity of the event and the statement may not be possible; a slight lapse may be permissible. Spontaneity is the essential factor. Cited cases which discuss the present sense impression exception are scant. *Houston Oxygen Co. v. Davis*, 139 Tex. 1, 161 S.W.2d 474 (1942), provides, perhaps, the clearest illustration of the exception. The appropriate subject matter of a statement of present sense impression is a description or explanation of an event or condition.

The present sense impression is not the same thing as the *res gestae* exception, although the *res gestae* concept has been used to cover situations where present sense impression would have been appropriate. *Houston Contracting Co. v. Atkinson*, 251 Miss. 220, 168 So. 2d 797 (1964). Rule 803 does not provide for an explicit *res gestae* exception. The rules, in effect, abandon the elusive concept of *res gestae*. Rules 803(1), (2), (3), and (4) have elements of the old *res gestae* exception, but they are far more specific and, therefore, they surmount much of the justified criticism regarding *res gestae*. For criticism in Mississippi of the *res gestae* concept, *see McCaskill v. State*, 227 So. 2d 847 (Miss. 1969); *Masonite Corp. v. International Woodworkers*, 215 So. 2d 691 (Miss. 1968); Barton and Cowart, *"The Enigma of Hearsay,"* 49 Miss. L.J. 31 (1978).

(2) Excited Utterance. In many respects, the excited utterance exception is similar to the former *res gestae* rule. The underlying theory of the excited utterance exception is that circumstances may create such an excited condition that the capacity for reflection is temporarily impeded and that statements uttered in that condition are thus free of conscious fabrication. As in the present sense impression exception, the essential ingredient here is spontaneity. With respect to the time element, the issue is the duration of the excited state. This, depending on the exact circumstances of a case, can vary greatly. The declarant need not be a participant but only an observer of the event which triggered the excitement. An

excited utterance need only "relate" to the startling event, and, therefore, the scope of the subject matter of the statement may be fairly broad.

(3) Then Existing Mental, Emotional, or Physical Condition. As the FRE Advisory Committee Note states, this exception is really a specialized application of Rule 803(1). Its purpose in being specially listed is to enhance its usefulness. The pre-rule *res gestae* exception is even more closely linked with Rule 801(3) than it is with Rule 801(1), (2), and (4). The exclusion in Rule 801(3) of statements which reflect backwards is necessary to prevent the hearsay rule from being totally consumed by the exception. The important case, *Shepard v. United States*, 290 U.S. 96, 54 S. Ct. 22, 78 L. Ed. 196 (1933), indicates the necessity for the exclusion. On the other hand, statements which indicate intention to do something in the future are admissible to prove that the act intended took place. *See Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 12 S. Ct. 909, 36 L. Ed 706 (1892); *Hall v. Hall*, 199 Miss. 478, 24 So. 2d 347 (1946).

One exemption from the exclusion is for statements of memory or belief which relate to the execution, revocation, identification, or terms of a declarant's will. There is no particular logical reason for this. Rather, the basis for allowing such statements is founded on necessity and expediency.

(4) Statements for Purposes of Medical Diagnosis or Treatment. Rule 803(4) represents a deviation from previous Mississippi practice in three significant ways. First, Rule 803(4) permits statements of past symptoms as well as present symptoms. Second the rule allows for statements which relate to the source or cause of the medical problem, whereas Mississippi courts formerly disallowed such statements. *See Field v. State*, 57 Miss 474 (1879) and *Miss. Cent. R.R. Co. v. Turnage*, 95 Miss. 854, 49 So. 840 (1909) for pre-rule Mississippi law. While statements about cause are permissible, statements concerning fault are still excludible. Third, the statement may be made either to a physician or to diagnostic medical personnel. Mississippi's pre-rule practice distinguished between narrative statements made to a treating physician and those made to an examining physician who was retained for use as an expert witness in the litigation. Statements made to the former were generally admissible, whereas no statements made to the latter were admissible. *See Miss. Cent. R.R. v. Turnage*, 95 Miss. 854, 49 So. 840 (1909). Rule 803(4) eliminates that distinction and permits statements made both for treating and diagnostic purposes. Under Rule 803(4) the statement need not be made to a physician. This is consistent with traditional Mississippi practice.

The amendment to Rule 803(4) is a recognition that medical diagnosis and treatment may encompass mental and emotional conditions as well as physical conditions. Moreover, the rule, by requiring the judge to find trustworthiness, gives the trial judge greater discretion than the original rule. By permitting the

recipient to be non-medical personnel, MRE 803(4) modifies case law interpretations of the former language of this exception and now conforms with prevailing interpretations of F.R.E. 803(4). *See* F.R.E. 803(4), Advisory Committee Notes.

(5) Recorded Recollection. Past recollection recorded has been recognized as a hearsay exception in Mississippi practice. Rule 803(5), however, clarifies much of the past confusion regarding that exception. An essential feature is that this exception may not be employed until there has been a preliminary showing that the witness's memory is exhausted to the extent that he is unable to testify fully and accurately.

There is great judicial discretion in Rule 803(5). As pointed out in the FRE Advisory Committee Note, the circumstances of a particular case will govern the method of establishing the initial knowledge and the contemporaneity and accuracy of the record in question. It is possible under Rule 803(5) to have several persons involved in the process of observing and recording.

(6) Records of Regularly Conducted Activity. Rule 803(6) is an expansion of the common law business records exception used in Mississippi. The records must be those of a regularly conducted business activity; however, the definition of business is broader than pre-rule practice in Mississippi permitted. It includes records of non-profit institutions and associations. It is important to note that the custodian as well as other qualified witnesses may testify. Thus, it is not necessary to call or to account for all participants who made the record.

However, the source of the material must be an informant with knowledge who is acting in the course of the regularly conducted activity. This is exemplified by the leading case of *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930) which is still the applicable law today under the rule. That case held that a police report which contained information obtained from a bystander was inadmissible; the officer qualified as one acting in the regular course of a business, but the informant did not.

Rule 803(6) specifically includes diagnoses and opinions as proper subjects of admissible entries, as well as the traditionally admissible entries pertaining to acts, events and conditions. The rule calls for the exercise of judicial discretion if there is an indication of a lack of trustworthiness. This permits the court to take into account the motivation of the informant.

The reference to self-authentication under Rule 902(11) is to confirm that the predicate for records under this exception may be by affidavit in appropriate cases.

(7) Absence of Entry in Records Kept in Accordance with the Provision of Paragraph (6). A record's failure to mention a matter which would ordinarily be contained in it is admissible to prove the nonexistence of the matter. This is innovative in Mississippi. Traditional Mississippi courts have admitted evidence of the absence of matter in the record only in the cases of public records.

While it has been unclear whether the absence of information was even hearsay, some courts have treated it as such and have found no exception to apply. Rule 803(7) settles the question of admissibility by clearly making the absence factor an exception.

(8) Public Records and Reports. Public records and reports have been admissible in evidence as an exception to the hearsay rule. Countless statutory provisions in Mississippi formerly provided for the admission of public records. Additionally, there was similar development in the common law. *Ludlow v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 317 So. 2d 47 (Miss 1975). Subparagraphs (A)(i) and (A)(ii) are similar to Mississippi practice. The rule makes no distinction between state and local records. Subparagraph (A)(iii) adds the new element to the exception as traditionally applied in Mississippi. Subparagraph (A)(iii) provides that some investigative reports may be treated as hearsay exceptions. To be admissible they must be factual findings made in an investigation which was conducted pursuant to lawful authority. Opinions and conclusions contained in such reports should be excluded.

The experience in other jurisdictions which have adopted an identical rule has been that judges are exercising great caution in admitting these reports. Often they are being excluded if based on hearsay or the opinions of those not involved in the preparation of the report. The rule expressly gives judges the discretion to exclude such reports. Even when admissible, public records under Subparagraph (A)(iii) may only be used in civil cases and in criminal cases on behalf of a defendant against the state. To permit the state to use such reports against a defendant would be to create confrontation rights problems.

(9) Records of Vital Statistics. This rule is similar to pre-existing Mississippi law. For example, M.C.A. § 41-57-9 formerly provided for the admission of certified copies of birth and death, and M.C.A. § 41-57-47 formerly provided for the admission of certified copies of marriage records.

(10) Absence of Public Record or Entry. Rule 803(10) is also similar to pre-rule Mississippi law. *See, e.g.*, M.C.A. § 13-1-83 (repealed effective July 1, 1991). While the Mississippi statute formerly provided for evidence in the

form of a certification, Rule 803(10) gives the possibility of a second form, i.e., oral testimony of the search.

(11) Records of Religious Organizations and (12) Marriage, Baptismal, and Similar Certificates. M.C.A. § 13-1-103 (repealed effective July 1, 1991) formerly provided for the admission of marriage certificates. However, Rules 803(11) and (20) go much further. The records of a religious organization are admissible under Rule 803(11) to show statements of personal and family history. Much of what is admissible might also be admissible under the business records exception.

(13) Family Records. This rule is an extension of existing Mississippi law. The Mississippi court has indicated it will recognize statements of personal or family relationship contained in the family Bible. *See Tisdale v. Jefferson Standard Life Insurance Co.*, 244 Miss. 839, 147 So. 2d 122 (1962).

(14) Records and Documents Affecting an Interest in Property. Because of the nature of title documents, they might conceivably be treated as public records. The Mississippi court has long recognized their admissibility. *See*, for instance, *Doe v. McCaleb*, 3 Miss (2 Howard) 756 (1838); *DeLashmet v. McClellen*, 152 Miss. 781, 118 So. 904 (1928).

(15) Statements in Documents Affecting an Interest in Property. Rule 803(15) provides that statements of fact in land documents constitute a hearsay exception. The circumstances under which land documents are made supply the hearsay exception guarantees of reliability and trustworthiness. The rule provides for the exclusion of statements when they fail to comply with the guarantee of trustworthiness. At any rate, many of these documents would be admissible under the conventional ancient document rule.

(16) Statements in Ancient Documents. The ancient documents rule is a traditionally recognized exception in Mississippi. Under this rule the common law period of time is reduced to a minimum of twenty years.

(17) Market Reports, Commercial Publications. This rule, for the most part, codifies existing practice. Mississippi has previously recognized an exception for mortality tables and market reports. *See Tucker v. Donald*, 60 Miss. 460 (1882) and *Yazoo & M.V.R. Co. v. M. Levy & Sons*, 141 Miss 199, 106 So. 525 (1925). The extension to existing practice is in the area of commercial publications. However, the guarantees of trustworthiness for mortality tables and market reports is similar, if not identical, to that for commercial publication. The public, in each case, relies on the publication.

(18) Learned Treatise. Rule 803(18) differs significantly from pre-rule Mississippi practice. It allows statements in learned treatises to be admitted as substantive evidence. This is a departure from Mississippi law which only provided for impeachment use of treatises. *Tucker v. Donald*, 60 Miss. 460 (1882); *Catholic Diocese of Natchez-Jackson v. Jaquith*, 224 So. 2d 216 (Miss. 1969). However, under the rule the statements are only admissible after (1) the witness testifies that the treatise is reliable, (2) another expert so testifies, or (3) the court takes judicial notice. Even then the treatise may not be used substantively unless the witness relied upon it in his testimony on direct examination or the witness was questioned about it on cross-examination. The rule explicitly states that the statements may not be given to the jury as exhibits; they may only be read to the jury. To submit the treatise to the jury would be to give its written statements more emphasis than the oral testimony presented to the jury.

(19) Reputation Concerning Personal or Family History. This rule is akin to the common law exception relating to family pedigree, although the rule is broader. For instance, a non-familial associate of a person may testify about the personal or family history of that person. The Mississippi court, however, has been moving towards this principle. *See Hathaway v. North*, 190 Miss 697, 1 So. 2d 490 (1941). The rule as stated is a recognition that knowledge of a person's history extends throughout his sphere, to family, friends, and community. This reputation evidence may be used for substantive evidence.

(20) Reputation Concerning Boundaries or General History. This rule codifies existing Mississippi law. *See*, for example, *Nixon v. Porter*, 34 Miss. 697 (1858).

(21) Reputation as to Character. This exception is concerned only with the hearsay aspect of reputation evidence. The exception is, in effect, a reiteration in the context of hearsay of Rule 405(a). Limitations upon admissibility based on other grounds are in Rules 404 and 608.

(22) Judgment of Previous Conviction. Rule 803(22) is a significant departure from traditional Mississippi practice. Past Mississippi practice has been to exclude judgments of convictions as substantive evidence of the facts which sustain it. *Gholson v. Smith*, 210 Miss. 28, 48 So. 2d 603 (1950). Under 803(22), however, evidence of a judgment of guilty in a felony-grade case is admissible as substantive evidence of any fact essential to uphold the judgment. It is not available where the judgment is based on a plea of *nolo contendere* or on a misdemeanor conviction. The theory for the exclusion of the misdemeanor conviction is based on practicality. Motivation to defend a misdemeanor charge is often minimal.

The exception does not include evidence of the conviction of a third person, offered against the accused in a criminal case, to prove any fact essential to uphold the judgment.

(23) Judgment as to Personal, Family or General History, or Boundaries. This rule is similar to Rule 803(22). It is related to Rules 803(19) and (20) which admit reputation evidence as hearsay exceptions.

(24) Other Exceptions. The rule reflects the realization that the law is not stagnant. As the FRE Advisory Committee Note indicates, it would be presumptuous to assume that the contemporary legal community has enumerated every single hearsay exception which possible could exist. The exceptions are not a closed system, and Rule 803(24) and its counterpart Rule 804(b)(5) allow for the future development of the law when the guarantees of reliability and trustworthiness can be found. While these two rules allow for judicial discretion, they do not permit an unfettered discretion which could ultimately devour the hearsay rule. Before admitting statements under this rule, the judge must make a finding that the statements being offered are sufficiently trustworthy and reliable. *See Cummins v. State*, 515 So. 2d 869 (Miss. 1987). One of the clearest examples of the circumstances meeting the criteria of Rule 803(24) is found in *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961).

(25) Tender Years Exception. Some factors that the court should examine to determine if there is sufficient indicia of reliability are (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated. Corroborating evidence may not be used as an indicia of reliability. *Smith v. State*, 925 So. 2d 825, 837 (Miss. 2006); *Hennington v. State*, 702 So. 2d 403, 415 (Miss. 1997). A finding that there is a substantial indicia of reliability should be made on the record.

Mississippi's pre-rule tender years exception did not define "tender years." *See Williams v. State*, 427 So. 2d 100 (Miss. 1983). Many jurisdictions limit their analogous exceptions to declarants under the age of fourteen years. However, the exception should not be necessarily limited to a specific chronological age. In appropriate cases, the exception might apply when the declarant is chronologically

older than fourteen years, but the declarant has a mental age less than fourteen years.

Corroboration required for admissibility under MRE 803(25)(B)(ii) need not be eyewitness testimony or physical evidence, but may include confessions, doctors' reports, inappropriate conduct by the child, and other appropriate expert testimony.

When any of the hearsay exceptions in Rule 803 are applied in a criminal case, the rights of the defendant under the Confrontations Clauses of Federal and State Constitutions must be respected. *Crawford v. Washington*, 124 S. Ct. 1354 (2004) (The confrontation clause forbids "admission of testimonial statements of a witness who did not appear at trial unless [the witness is] unavailable to testify, and the defendant had had a prior opportunity for cross-examination."); *Davis v. Washington*, 126 S. Ct. 2266 (2006) (Among other things, prior testimony, depositions, affidavits, and confessions are testimonial, as are other statements to police if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."). *See also Osborne v. State*, 942 So. 2d 193 (Miss. Ct. App. 2006) (applying Rule 803(25) in light of *Crawford* and finding video of child's statements produced at the direction of the district attorney testimonial but no confrontation clause violation because child testified and was subject to cross-examination); *Bell v. State*, 928 So. 2d 951 (Miss. 2006) (child's statements to police testimonial and therefore improperly admitted under 803(2)); *Hobgood v. State*, 926 So. 2d 847 (Miss. 2006) (applying Rule 803(25) in light of *Crawford* and finding statements by children to family members and health care providers not testimonial but similar statements to police testimonial); *Foley v. State*, 914 So. 2d 677 (Miss. 2005) (statements made as part of "neutral medical evaluations" not testimonial and properly admitted under 803(4) and 803(25)).

Rule 804. Exceptions to the Rule Against Hearsay – When the Declarant Is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness;

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4); or

(6) is a child for whom testifying in the physical presence of the accused is substantially likely to impair the child's emotional or psychological health substantially.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) ***Former Testimony.*** Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had – or, in a civil case, whose predecessor in interest had – an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) ***Statement Under the Belief of Imminent Death.*** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) ***Statement Against Interest.*** A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it tends to expose the declarant to criminal liability and is offered to exculpate the accused.

(4) ***Statement of Personal or Family History.*** A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) ***Other Exceptions.*** A statement not specifically covered by this Rule if:

(A) the statement has equivalent circumstantial guarantees of trustworthiness;

(B) it is offered as evidence of a material fact;
(C) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;
(D) admitting it will best serve the purposes of these rules and the interests of justice; and
(E) before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

(6) ***Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.*** A statement offered against a party that wrongfully caused – or acquiesced in wrongfully causing – the declarant's unavailability as a witness, and did so intending that result.

Advisory Committee Note

The language of Rule 804 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Rule 804(b)(5) has been restructured with additional subparagraphs. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

(a) In defining unavailability, the rule lists six situations in which unavailability exists:

(1) When the witness exercises a privilege, the witness is deemed to be unavailable as to the portion of the witness's testimony which is covered by the claimed privilege. The trial court, however, may first make a preliminary determination that the witness has the right to claim the privilege asserted.

(2) When a witness refuses to testify, despite being ordered to do so by the court, the witness is deemed unavailable.

(3) If the witness testifies that the witness has a lack of memory as to the subject matter under inquiry, the witness is deemed to be unavailable.

(4) Death and sickness render a witness unavailable. *See Paulk v. Housing Authority of Tupelo*, 228 So. 2d 871 (Miss. 1969), and *Home Ins. Co. v. Gerlach*, 220 Miss. 732, 71 So. 2d 787 (1954).

(5) Absence of the witness from the hearing accompanied by an inability of the proponent of the evidence to compel the witness's presence

is within the definition of unavailability. Nothing in Rule 804, however, affects the admissibility of depositions otherwise admissible under M.R.C.P. 32.

(6) The rationale for this definition of unavailability is based on the recognition of child trauma.

A finding of unavailability and indicia of reliability should be made on the record.

If, however, the proponent of the evidence is responsible for the existence of any of the aforementioned conditions, the condition of unavailability for the purposes of Rule 804 is not satisfied.

(b)(1) *Former Testimony.* An essential ingredient of the former testimony exception has always been the unavailability of the declarant.

Rule 804(b)(1) permits the prior testimony to be offered (1) against the party *against* whom it was previously offered or (2) against the party who offered it previously. Thus, the rule equates the direct and redirect examination of one's own witness with the cross-examination of an adversarial witness.

It is not required that the former testimony be in an earlier proceeding of the same case. It is only essential that the party against whom it is directed had a similar motive and an opportunity to develop the testimony on the previous occasion. The rule does not speak in terms of identity of issues. Identity of issues is only important because it bears on motive. Thus, the rule deletes the law common phrase "identity of issues" and substitutes "motive" and "opportunity."

(b)(2) *Statement Under Belief of Impending Death.* The rule allows for the dying declaration to be used in homicide cases and in civil actions, but it is not available in non-homicide criminal actions.

(b)(3) *Statement Against Interest.* Rule 804(b)(3) expands the common law exception of declaration against interest. Traditionally, courts have recognized two declarations against interest, pecuniary and proprietary. The rule extends the exception to declarations against penal interest on the theory that such declarations are reliable. No reasonable person would make such a statement and invite possible criminal prosecution if the statement were not true.

Subparagraph (b)(3)(B) is concerned with hearsay which inculpates the declarant but exculpates the criminal defendant. Unless such a statement can be corroborated as reliable, it will be excluded.

(b)(4) *Statement of Personal or Family History.* This rule is similar to Rule 803(19). The distinguishing feature is that the statements under Rule 804(b)(4) are statements made by unavailable declarants concerning their own personal and family history or that of a family member or intimate associate. Rule 803(19) focuses more on reputation.

(b)(5) This rule is identical to Rule 803(24) in both language and intent.

(b)(6) *Forfeiture by Wrongdoing.* Rule 804(b)(6) provides that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." *United State v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), *cert. denied*, 104 S. Ct. 2385(1984). *Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006) ("While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system."). Likewise, a party forfeits rights under the Confrontation Clause when misconduct attributable to a party causes a witness's absence. *U.S. v. Carson*, 455 F.3d 336 (C.A.D.C. 2006) (wrongdoing by co-conspirators). The wrongdoing need not consist of a criminal act and the rule applies to all parties, including the government.

When any of the hearsay exceptions in Rule 804 are applied in a criminal case, the rights of the defendant under the Confrontations Clauses of Federal and State Constitutions must be respected. *Crawford v. Washington*, 124 S. Ct. 1354 (2004) (The confrontation clause forbids "admission of testimonial statements of a witness who did not appear at trial unless [the witness is] unavailable to testify, and the defendant had had a prior opportunity for cross-examination."); *Davis v. Washington*, 126 S. Ct. 2266 (2006) (Among other things, prior testimony, depositions, affidavits, and confessions are testimonial, as are other statements to police if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."). *See also Rubenstein v. State*, 941 So. 2d 735 (Miss. 2006) (applying Rule 804(b)(5) in light of *Crawford* and finding statements nontestimonial); *Bell v. State*, 928 So. 2d 951 (Miss. Ct. App. 2006) (applying Rules 804(a)(6) and 803(2) in light of *Crawford* and finding statements testimonial).

Rule 805. Hearsay Within Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Advisory Committee Note

The language of Rule 805 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule relates to multiple hearsay. Each hearsay part must qualify under an exception to be admissible.

Rule 806. Attacking and Supporting the Declarant's Credibility
When a hearsay statement – or a statement described in Rule 801(d)(2)(C), (D), or (E) – has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Advisory Committee Note

The language of Rule 806 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 806 permits the impeachment and rehabilitation of a hearsay declarant. The use of inconsistent statements to impeach the declarant is not limited to prior inconsistent statements. Under the rule the inconsistent statements may be statements made subsequent to the out-of-court declaration at hand.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Authenticating or Identifying Evidence
(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples. The following are examples only – not a complete list – of evidence that satisfies the requirement:

(1) ***Testimony of a Witness with Knowledge.*** Testimony that an item is what it is claimed to be.

(2) ***Nonexpert Opinion About Handwriting.*** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) ***Comparison by an Expert Witness or the Trier of Fact.*** A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) ***Distinctive Characteristics and the Like.*** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) ***Opinion About a Voice.*** An opinion identifying a person's voice – whether heard firsthand or through mechanical or electronic transmission or recording – based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) ***Evidence About a Telephone Conversation.*** For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) ***Evidence About Public Records.*** Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) ***Evidence About Ancient Documents or Data Compilations.*** For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) ***Evidence About a Process or System.*** Evidence describing a process or system and showing that it produces an accurate result.

(10) ***Methods Provided by the Mississippi Constitution or Court Rule.*** Any method of authentication or identification allowed by the Mississippi Constitution or a rule prescribed by the Mississippi Supreme Court.

Advisory Committee Note

The language of Rule 901 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and

terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

(a) The authentication and identification aspects of evidence are central to the concept of relevancy. Unless it be satisfactorily shown that an item of evidence is "genuine," the item is irrelevant and should be excluded.

(b) This subdivision illustrates some of the possibilities under Rule 901. It is only illustrative; it does not serve as a limitation. Some of the illustrations are discussed below:

(2) *Nonexpert Opinion on Handwriting.* This authentication method has been traditionally allowed in the Mississippi courts. The rule does not set forth what the necessary criteria are for the nonexpert opinion. However, from common law practice it appears that the opinion may be based on several different standards including the witness's familiarity with the person's handwriting or the witness's corresponding with the person. *See Western Union Telegraph Co v. Goodman*, 166 Miss. 782, 146 So. 128 (1933); *Wiggins v. State*, 224 Miss. 414, 80 So. 2d 17 (1955); *McCarty v. Love*, 145 Miss. 330, 110 So. 795 (1927).

(3) *Comparison by Trier or Expert Witness*. The judge need not rule that the exemplars are genuine before the expert compares them. The standard for comparison is no different, therefore, from the standard used in other situations, e.g., ballistics comparison. *See* FRE 901 Advisory Committee Note.

(4) *Distinctive Characteristics and the Like*. The possibilities under the rule are myriad. Letters or phone conversations disclosing knowledge peculiar to an individual may qualify, as well as distinctive language patterns. *See* FRE 901 Advisory Committee Note.

(5) *Voice Identification*. This authentication method has been utilized in Mississippi practice. Familiarity may be acquired either before or after the speaking which is the subject of the identification.

(6) *Telephone Conversations*. One may authenticate a conversation when he calls the number listed for a person or a business and the answering party either identified himself as that individual or conducted a transaction on behalf of the business called.

(7) *Public Records or Reports*. This represents the existing law in Mississippi and extends the common law principle to include electronically-stored information. Proving a record is public and that it is in the custody of a public official is sufficient.

(8) *Ancient Documents or Data Compilation*. The twenty-year rule for ancient documents under Rule 803(16) is repeated here. The illustration extends the authentication to electronically-stored information as in Rule 901(7). Except for the reduction of the years required for ancient documents, this illustration is consistent with Mississippi practice.

(9) *Process or System*. This illustration covers systems such as x-rays, some chemical tests, and computers. Example (9) does not foreclose taking judicial notice of the accuracy of a process or system.

(10) *Other Methods*. This illustration is given as notice that other methods are not superseded.

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal – or its equivalent – that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the

signature and official position of the signer or attester – or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. A copy of an official record – or a copy of a document that was recorded or filed in a public office as authorized by law – if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Mississippi Supreme Court pursuant to statutory authority.

(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

(7) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) Acknowledged Documents. A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) Presumptions Under a Federal or State Statute. A signature, document, or other matter that a Mississippi or federal statute declares to be presumptively or *prima facie* genuine or authentic.

(11) Certified Records of a Regularly Conducted Activity. A record that meets the requirements of Rule 803(6), if a certificate of the custodian or another qualified witness complies with subparagraph (A).

(A) Certificate. The certificate must show:

(i) the custodian's or witness's first hand knowledge of the making, maintenance, and storage of the record; and

(ii) that the record complies with Article X and Rules 803(6)(A)-(C) and 901(a).

A certificate relating to a foreign record must also be accompanied by the final certification required by paragraph (3).

(B) Notice. Before the trial or hearing at which the record will be offered, the proponent must give an adverse party notice of the intent to offer the record – and must provide a copy of the record and certificate – so that the party has a fair opportunity to state any objection. Otherwise, the record is not self-authenticating under this paragraph (11).

(C) Making Objections. An adverse party waives any objection that is not:

(i) stated specifically in writing; and

(ii) served within 15 days after receiving the notice required by subparagraph (B), or at a later time that the parties agree on or that the court allows.

(D) Hearing and Ruling on Objections. The proponent must schedule a hearing on any objection, and the court should determine admissibility of the record before the trial or hearing at which it may be offered. If the court cannot do so, the record is not self-authenticating under this paragraph (11).

(E) Sanctions. In a civil case after the trial or hearing, the proponent may move that the objecting party and attorney pay the expenses of presenting the evidence necessary to have the record admitted. The court must so order, if it determines that the objection raised no genuine question and lacked arguable good cause.

(F) Definitions. In this paragraph "certificate" means:

(i) for a domestic record, a written declaration under oath or attestation given under penalty of perjury; and

(ii) for a foreign record, a written declaration signed in a foreign country that, if falsely made, would subject the maker to criminal penalty under that country's laws.

Advisory Committee Note

The language of Rule 902 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. As before, Rule 902 uses numbered paragraphs as first-level formatting, rather than typical lower-case lettered subdivisions, because changing the structure of the Rule would disrupt electronic

search results and thus impose transaction costs that outweigh any benefit in strictly consistent formatting. Rule 902(11) has been restructured with additional subparagraphs and items. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 902 lists situations in which authenticity is taken as sufficiently established for purpose of admissibility without extrinsic evidence. However, the opponent of the evidence may always challenge the authenticity. In essence, the rule shifts the burden to the opponent. In 1990 a technical amendment was made. No substantive change was made or intended.

(1) Domestic Public Documents Under Seal. The underlying policy rests on the fact that forgery is easily detected, and the possibility of the documents not being genuine is, thus, remote. A wide range of Mississippi public records fall into this category, including acknowledgments and certificates authenticating copies of public records.

(2) Domestic Public Documents Not Under Seal. This provision permits the admission in evidence of documents signed by an official whose office has no seal, provided a second official having a seal certifies, under seal, the genuineness of the first signature.

(3) Foreign Public Documents. The presumption of authenticity extends to foreign official documents by a procedure of certificate. It is derived from M.R.C.P. 44(a)(2). M.C.A. § 13-1-101 (repealed effective July 1, 1991) formerly governed this procedure.

(4) Certified Copies of Public Records. Numerous statutes already exist in Mississippi providing for the authentication of copies of public records by certificate. The certificate itself qualifies as a public document, receivable as authentic when it conforms to Rule 902(1), (2), or (3). *See* M.R.C.P. 44(a). The certification under Rule 902(4) pertains to public records and not to public documents in general.

(5) Official Publications. M.R.C.P. 44(a)(1) has the same effect.

(6) Newspapers and Periodicals. This is new practice in Mississippi. The rule is based on the premise that the possibility of forgery in this area is negligible.

(7) Trade Inscription and the Like. *Curtiss Candy Co. v. Johnson*, 163 Miss. 426, 141 So. 762 (1932) early established this rule in Mississippi. The possibility of forgery is too slim for the court to require a more detailed method of authentication.

(8) Acknowledged Documents. This extends existing Mississippi law. In Mississippi the self-authentication of acknowledged documents was formerly available through a limited number of statutes, e.g., M.C.A. § 13-1-97, § 13-1-143 (both repealed effective July 1, 1991).

(9) Commercial Paper and Related Documents. Mississippi practice already allows for authentication of commercial paper pursuant to U.C.C. § 1-202, § 3-307, and § 8-105.

(11) Certified Records of Regularly Conducted Activities. This method of self-authenticating the records of regularly conducted activities is suggested by Rule 902(11) of the Uniform Rules of Evidence. It is intended to allow, in proper cases, the introduction of these records without the expense, trial time consumption and inconvenience to witnesses who are called to provide what is often purely formalistic and undisputed predicate evidence. Subparagraph (A) permits proof by affidavit of the qualifications of the witness and the usual predicates of authenticity, the Best Evidence Rule and the Rule 803(6) hearsay exception and explains the required certification. Subparagraph (B) requires that the proponent have early anticipation of the use of this method so there is time before trial for notice, objections and a hearing. Subparagraph (D) provides that if objections are not decided before the trial, the proponent must plan to call the witness. The sanction under subparagraph (E) for frivolous objections in civil cases is based on the M.R.C.P. 37(c) sanction for failure to admit.

When self-authenticating records are offered against the defendant in criminal cases, the rights of the defendant under the confrontation clauses of Federal and State Constitutions must be considered.

Rule 903. Subscribing Witness's Testimony

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Advisory Committee Note

The language of Rule 903 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Under this rule testimony of subscribing witnesses to a will may nonetheless be necessary to authenticate the will. *See* M.C.A. § 91-7-7 and § 91-7-9.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions That Apply to This Article
In this article:

(a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) A "photograph" means a photographic image or its equivalent stored in any form.

(d) An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout – or other output readable by sight – if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

(e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Advisory Committee Note

The language of Rule 1001 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Lower-case lettered subdivisions have replaced numbered paragraphs as first-level formatting. The definitions of "writing" and "recording" – formerly combined in a single definition – now appear in separate subdivisions. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

(a) and (b) Writings and Recordings. This provision recognizes that current techniques of recordation are more complex than what we have

traditionally defined as "written" or "recorded." To the extent that the best evidence rule is concerned, the rule is expanded to include modern technological methods of recording.

(c) Photographs. Photographs are defined to include an assortment of pictures.

(d) Original. This rule covers multiple originals, copies which are executed in multiple numbers. A computer printout under the rule is deemed to be an original.

(e) Duplicate. Copies which are produced by such highly accurate methods that the possibility of error is improbable are treated as originals pursuant to Rule 1003. Other copies which are subsequently produced manually are outside the definition. *See* FRE 1001, Advisory Committee Note.

Rule 1002. Requirement of the Original
An original writing, recording, or photograph is required in order to prove its content unless otherwise provided by law.

Advisory Committee Note

The language of Rule 1002 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule is a statement of the so-called best evidence rule. The best evidence rule only applies to writings, recordings, or photographs, as defined in Rule 1001, when a party seeks to prove their contents.

Rule 1003. Admissibility of Duplicates
A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Advisory Committee Note

The language of Rule 1003 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make

style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule is a change from existing Mississippi law. The Mississippi practice has been to exclude duplicates except in cases where the original was unavailable and there was a legitimate basis for the unavailability. *See Turner v. Thomas*, 77 Miss 864, 28 So. 803 (1900). A body of case law has developed to define "unavailability" and legitimate reasons for it. *See* Ellis and Williams, *Mississippi Evidence*, § 11-3.

Rule 1004. Admissibility of Other Evidence of Content
An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

(b) an original cannot be obtained by any available judicial process;

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

(d) the writing, recording, or photograph is not closely related to a controlling issue.

Advisory Committee Note

The language of Rule 1004 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Lower-case lettered subdivisions have replaced numbered paragraphs as first-level formatting. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Secondary evidence is admissible in lieu of the original in certain instances. Subdivisions (a), (b), and (c) conform to existing Mississippi case law. Subdivision (d) dispenses with the best evidence rule in collateral matters. The rule follows the "English Rule" which holds that there are no degrees of secondary

evidence. Secondary evidence is not ranked, and, thus, no principle of preference is established.

Rule 1005. Copies of Public Records to Prove Content
The proponent may use a copy to prove the content of an official record – or of a document that was recorded or filed in a public office as authorized by law – if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Advisory Committee Note

The language of Rule 1005 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule is similar to Mississippi practice. It recognizes that it is improbable that one could utilize an original public record in court. Therefore, certified copies are admissible, as well as oral testimony of a witness who has compared the original with the copy. Rule 1005 differs from 1004 by recognizing "degrees" of secondary evidence in regard to the admission of public records.

Rule 1006. Summaries to Prove Content
The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

Advisory Committee Note

The language of Rule 1006 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule represents a change in Mississippi practice. Rule 1006 refers to voluminous writings, as well as recordings and photographs. Under the rule, a summary of the voluminous material is sufficient as admissible evidence. The underlying material need not be introduced simultaneously into evidence as had been the practice in Mississippi. *See Crawford v. State*, 162 Miss. 158, 138 So. 589 (1932). This Mississippi court has treated the summaries as demonstrative tools rather than as evidence. Rule 1006 provides that the summaries are clearly admissible as evidence, but requires that the underlying material be made available to the other parties for their examination.

Rule 1007. Testimony or Statement of a Party to Prove Content

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Advisory Committee Note

The language of Rule 1007 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The original of a writing, recording, or photograph is not required to be produced if the party against whom it is offered testifies about, or admits in writing, the contents of such original.

Rule 1008. Functions of the Court and Jury

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines – in accordance with Rule 104(b) – any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.

Advisory Committee Note

The language of Rule 1008 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Most preliminary questions of fact regarding the best evidence rule will be decided by the judge pursuant to Rule 104. For example, the judge must decide whether the loss of the original has been established. On the other hand, questions which go to the merits of the case are properly jury questions, subject, however, to the control vested in the trial judge by Rule 104(b), *supra*.

ARTICLE XI. MISCELLANEOUS RULES

Rule 1101. Applicability of the Rules
(a) To Courts and Proceedings. These rules apply to all cases and proceedings in Mississippi courts, except as provided in subdivision (b).

(b) Exceptions. These rules – except for those on privilege – do not apply to the following:

(1) the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;
(2) grand-jury proceedings;
(3) contempt proceedings in which the court may act summarily; and
(4) these miscellaneous proceedings:

- extradition or rendition;
- issuing an arrest warrant, criminal summons, or search warrant;
- probable cause hearings in criminal cases and youth court cases;
- sentencing;
- disposition hearings;
- granting or revoking probation; and
- considering whether to release on bail or otherwise.

Advisory Committee Note

The language of Rule 1101 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Rule 1101(b) has been restructured slightly, reordering paragraphs (3) and (4). These changes are

intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Subdivision (a) provides for the applicability of the rules in all actions in courts in the state with enumerated exceptions which are set forth in Subdivision (b).

Rule 1102. Title
These rules are the Mississippi Rules of Evidence and may be cited as MRE.

Advisory Committee Note

The language of Rule 1102 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. As with other recent sets of procedural rules, the suggested citation form omits the use of periods; thus "MRE" replaces "M.R.E." These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1103. Inconsistent Rules Repealed
Any evidentiary rule in a statute, court decision, or court rule that is inconsistent with the Mississippi Rules of Evidence is hereby repealed.

Advisory Committee Note

The language of Rule 1103 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.