

REQUEST FOR COMMENTS

The Supreme Court of Mississippi's Rules Committee on Civil Practice and Procedure seeks comments from the bench, the bar, and the public on the Motion to Amend MRE 802 and Comment to MRE 804 filed by the Advisory Committee on Rules.

Comments must be filed with the Clerk of Appellate Courts at Post Office Box 249, Jackson, Mississippi 39205. **The filing deadline is July 31, 2015.**

89-K-99002-SC7

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FILED

IN RE: AMENDMENT OF MRE 802
AND COMMENT TO MRE 804;

MAR 09 2015

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

MOTION TO AMEND MRE 802 AND COMMENT TO MRE 804

Comes now the Supreme Court Rules Advisory Committee, pursuant to Mississippi Rule of Appellate Procedure 27(f), and moves the Mississippi Supreme Court to amend MRE 802 and the Comment to MRE 804 as follows:

Mississippi Rules of Evidence 802

Hearsay is not admissible except as provided by law. The words “as provided by law” include other rules prescribed by the Mississippi Supreme Court.

Comment to Mississippi Rules of Evidence 804

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

.....

(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 (a)(3)(B).

The proposed amendments are sought to rectify a “disconnect” between MRCP 32(a) and MRE 804. The deposition of a medical doctor, for example, is admissible at trial under MRCP 32(a) but not necessarily under MRE 804(b)(1). Professor Robert Weems of the Ole Miss Law School first brought this disparity to the Committee’s attention a number of years ago with a memo.

MOTION# 2015-1057

MRCP 32(a) provides a variety of ways that a deposition of a witness may be introduced in evidence. Many of these, but not all, are consistent with the Mississippi Rules of Evidence. The most notable disconnect is between MRCP 32(a)(3)(E) and MRE 804, as there is no analog in the MRE providing for the admissibility of the deposition of a medical doctor. There are also no provisions in MRE 804(a) that correspond precisely to MRCP 32(a)(3)(B) (witness is out of state or more than 100 miles from the place of trial), (C) (witness is imprisoned), or (F) (exceptional circumstances). The Comment to MRE 804 addresses part of the issue in stating the “nothing in Rule 804, however, affects the admissibility of depositions otherwise admissible under M.R.C.P. 32(a)(3)(B).”

The Committee noted that the Mississippi Rules of Civil Procedure were promulgated in 1982, with the Mississippi Rules of Evidence becoming effective four years later. Significantly, MRE 1103 provides that “All evidentiary rules, whether provided by statute, court decision or court rule, which are inconsistent with the Mississippi Rules of Evidence are hereby repealed.” The Committee concluded that notwithstanding the apparent inconsistency, MRE 1103 should not be read as preempting MRCP 32.

The Committee considered the best way to correct the inconsistency first pointed out by Professor Weems. Following much study and consideration, the Committee concluded that MRE 804 does not need to be amended because the MRCP 32 issue is a matter of convenience, not unavailability. The Committee did conclude that there should be an amendment to MRE 802 clearly foreclosing any argument that MRCP 32(a)(3)(E) is preempted by MRE 804.

Two options were identified. First, a narrow amendment to MRE 802 was considered to add that the words “as provided by law” include the Mississippi Rules of Civil Procedure. There was significant support in the Committee for this amendment. However, the Committee

ultimately decided on a broader amendment to MRE 802 adding that the words “as provided by law” include other rules prescribed by the Mississippi Supreme Court.

The Committee noted that an accompanying change would also need to be made to the Comment to MRE 804. Presently, the Comment is too restrictive in that it refers only to subsection (a)(3)(B) of MRCP 32. Instead, the Comment should be amended so that all subsections of MRCP 32, as they relate to the admissibility of hearsay via depositions, are acknowledged. The above proposed amendment to the Comment does this by striking the specific reference to the subsection. The motion for the amendment to MRE 802 and the Comment to MRE 804 passed the Committee unanimously.

It is therefore the unanimous motion of the Supreme Court Rules Advisory Committee, for the reasons set out, that the above amendments to MRE 802 and the Comment to MRE 804 be considered by the Mississippi Supreme Court.

SO MOVED, this the 6th day of March, 2015.

SUPREME COURT RULES ADVISORY
COMMITTEE



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