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Mississippi Defense Lawyers Association

Defending the Future of Mississippi

ESTABLISHED IN 1965

FILED

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OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

December 30, 2015

Mississippi Supreme Court
ATTN: Supreme Court Rules Committee on Civil Practice and Procedure
Post Office Box 249
Jackson, Mississippi 39205

Re: Proposed Revisions to Mississippi Rules of Civil Procedure

To the Justices of the Mississippi Supreme Court:

The Mississippi Defense Lawyers Association greatly appreciates the opportunity for public comment on the Mississippi Rules of Civil Procedure Revision Project. The MDLA, founded in 1965, is comprised of attorneys who primarily defend civil lawsuits. The principle aim of the MDLA is to promote improvements in the administration of justice, professionalism, legal scholarship, and the quality of service rendered by legal defense professionals to their clients and the courts before which they practice. The MDLA includes among its membership many lawyers in every area of civil practice, including lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, and in-house counsel at corporations. The MDLA is proud to represent the voice of the civil defense bar.

I.

The MDLA has reviewed the proposed amendments regarding MRCP Rules 16 and 26 and Rule 4.04 of the URCCCP which were proposed by the Court and posted for comment on March 16, 2015. The MDLA supports the proposed amendments as proposed by the Court.[1]

II.

In addition to supporting the current proposals above, the MDLA recommends the following rules be amended:

[1] We note that the Rules Committee on Civil Practice and Procedure made various proposals regarding revisions to Rules 16 and 26, Rule 4.04 of the URCCCP and other rules. The Court's final proposed amendments differ from those proposals. For the sake of clarity, the MDLA makes no comment on the Committee's previous proposals. The MDLA, however, fully supports the current proposal posted by the Court on March 16, 2015.

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A. Rule 45

The MDLA proposes that Rule 45 be amended to permit attorneys of record in a matter to issue subpoenas. This change would simplify and streamline the process for issuing subpoenas in our civil practice. Currently, the rule only permits a clerk of the court to issue subpoenas. This is a time-consuming and cumbersome process considering the time spent in mailing the subpoenas to a clerk and waiting for their return. Federal rule 45 and many state court analogous rules permit counsel of record in a case to issue such subpoenas. The MDLA proposes adding the following sentence to Rule 45(a)(1):

"An attorney admitted to practice in this State, as an officer of the court, may also issue and sign a subpoena in any action pending in a court of this State in which the attorney is counsel of record."

B. Rule 1.10 UCCR

Uniform Chancery Court Rule 1.10 is the counterpart in Chancery practice to Rule 4.04 of the URCCCP. For the same reasons the Court has proposed the amendment to Rule 4.04 of the URCCCP, the MDLA believes the corresponding Uniform Chancery Court rule would similarly benefit.

C. Rule 32(a)

The MDLA believes there remains an inconsistency between Rule 32(a) and Rule 804(b)(1) of the Mississippi Rules of Evidence. This inconsistency was not fully addressed by the recent amendment of Rule 802 that became effective December 1, 2015.

Rule 32(a) currently permits a deposition of a witness to be used at trial if the witness meets certain unavailability criteria, or is a medical doctor, among other grounds. However, Rule 804(b)(1) permits the use of a deposition at trial under somewhat similar (but not identical) unavailability requirements, but only if the party against whom the testimony is offered "had an opportunity and similar motive" to develop the testimony. Thus, the Rules of Evidence and the Civil Procedure Rules set up two differing standards. Which standard should a trial judge employ?

A revision to Rule 802 took effect on December 1, along with an Advisory Committee Note to Rule 804 that partially addressed the issue. However, the commentary language appears to conflicts with case law, and with language in other comments. For instance, the existing Note to Rule 32(a) recognizes an inconsistency only partially resolved by the December 1 revisions.

The Court should consider *Emil v. Mississippi State Bar*, 690 So. 2d 301 (Miss. 1997). In *Emil*, the Court seemed to engraft a Rule 804(b)(1) filter for "opportunity and similar motive" into Rule 32's admissibility of a deposition as a requirement to avoid hearsay, thereby harmonizing

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both rules. In other words, *Emil* suggests that it is not enough to merely show that the party against whom the deposition is being offered was unavailable or otherwise met the criteria in Rule 32, but rather that such party should also have also been afforded "an opportunity and similar motive to develop the testimony through direct, cross or re-direct examination." If so, this is an important difference from federal practice under FRCP 32, which completely disregards any necessity to meet FRE hearsay exceptions when the former statement is a deposition.

Having this additional filter of 804(b)(1) for depositions is important when they are taken early in a case before all the facts necessary to properly cross-examine a witness have been developed in discovery or when motive in questioning a witness is much different.

For instance, the motive in taking a fact/expert deposition for *Daubert* reliability evaluation is completely different than that for cross-examination at trial. In the former, you are trying to fully develop the opinions, the basis for them, and the method the witness employed in reaching conclusions. You ask wide open, why, when, how type questions. You are not prepared to cross examine the witness because you are hearing things for the first time that require you to consult with your own experts to be able to conduct a cross examination. At trial, you ask compressed, leading, highly focused questions to which you already know the answers, so as to narrow and discredit the testimony of the witness.

In other instances, whether the witness is a fact witness or expert, you are simply trying to find out what the witness knows because the witness will not talk to you, or is not permitted to talk to you (treating physician). This blind inquiry into the unknown is totally different than what one would do to cross-examine the witness at trial.

In keeping with the Court's previous statements in *Emil*, the MDLA recommends making it clear that Rule 32 is subject to the hearsay requirements of Rule 804.

Thank you for your consideration of these recommendations. We look forward to any additional feedback regarding the above.

Respectfully,

R. Bradley Best
President, MDLA

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HOLCOMB DUNBAR
ATTORNEYS

FAX TRANSMISSION

TO:	Muriel Ellis, Clerk
FAX NO:	601-359-2407
FROM:	R. Bradley Best, Esq.
DATE:	30 December 2015
RE:	Attention: Supreme Court Rules Committee on Civil Practice and Procedure
OUR FILE :	115018
TOTAL PAGES (INCLUDING THIS PAGE):	4

Dear Ms. Ellis:

As a follow-up to your telephone conversation with my assistant, Melinda, please see attached correspondence to the Supreme Court Rule Committee on Civil Practice and Procedure. It is my understanding that your offices will be closed tomorrow and Friday. A hard copy of said correspondence will follow by mail.

Thank you for your assistance with this matter and should you have any questions, please do not hesitate to contact us.

Sincerely,

R. Bradley Best

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