

Serial: 103540

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99002-SCT

***RE: MISSISSIPPI RULES OF
EVIDENCE***

ORDER

This matter has come before the Court en banc on the Court's own motion. Having considered Mississippi Rules of Evidence, Rule 504 and its Comment, the Court finds that amendment of Rule 504 and its Comment as set forth in Exhibit "A" hereto will promote the fair and effective administration of justice.

IT IS THEREFORE ORDERED that Rule 504 of the Mississippi Rules of Evidence and the Comment thereto are amended as set forth in Exhibit "A" hereto.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this Order upon the minutes of the Court and shall forthwith forward a true certified copy hereof to West Publishing Company for publication as soon as practical in the advance sheets of *Southern Reporter, Second Series (Mississippi Edition)* and in the next edition of *Mississippi Rules of Court*.

SO ORDERED, this the 29th day of March, 2003.

/s/ William L. Waller, Jr.
WILLIAM L. WALLER, JR.

McRAE, P.J. AND EASLEY, J. DISSENT
DIAZ, J., NOT PARTICIPATING

EXHIBIT "A" TO ORDER

MISSISSIPPI RULES OF EVIDENCE

RULE 504. HUSBAND-WIFE PRIVILEGE

(a) Definition. A communication is confidential if it is made privately by any person to that person's ~~his or her~~ spouse and is not intended for disclosure to any other person.

(b) General Rule of Privilege. In any proceeding, civil or criminal, a person has a privilege to prevent that person's ~~his~~ spouse, or former spouse, from testifying as to any confidential communication between that person and that person's ~~himself and his~~ spouse.

(c) Who May Claim the Privilege. The privilege may be claimed by either spouse in that spouse's ~~his or her~~ own right or on behalf of the other.

(d) Exceptions. There is no privilege under this rule in civil actions between the spouses or in a proceeding in which one spouse is charged with a crime against ~~the person or property of~~ (1) the other, (2) a child of either, (3) a person residing in the household of either, or (4) (1) the person of any minor child or (2) the person or property of (i) the other spouse, (ii) a person residing in the household of either spouse, or (iii) a third person committed in the course of committing a crime against any of the persons described in (d)(1), or (2) or (3) of this rule.

[Rule 504(d) amended in *Fisher v. State*, 690 So. 2d 268, 272 (Miss. 1996) to "apply prospectively upon publication in West's *Southern Reporter*" (published in *Southern Reporter 2d* advance sheet issue of May 1, 1997; amended May 2, 2002, amended effective April 3, 2003.)]

Comment

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 ~~he~~ learned it from one of the spouses directly. Rule 504(a) is in accord with existing Mississippi practice.

Rule 504 (b) states the general rule. One spouse can prevent the other from testifying regarding the confidential communication in either a civil or criminal proceeding.

~~The privilege does not extend to cases in which one is charged with a crime against the person or the property of (1) the other spouse, (2) a child of either of them, (3) a person, familial or non-familial, residing in the household of either, or (4) another person when in the act of committing a crime against any of them.~~

Rule 504(c) was amended in 2002 to make the spousal privilege rule consistent with Rule 601(a)(1) which makes spouses competent witnesses against each other in civil actions between them. The policy of preserving marital harmony which supports both rules is not applicable in cases in which they are adversary parties.

[Amended March 20, 1995; amended May 2, 2002, amended effective April 3, 2003.]