

Serial: **113820**

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99002-SCT

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

ORDER

This matter is before the Court en banc on petition of Professor Deborah H. Bell for amendment of Rule 503 of the Mississippi Rules of Evidence. Having considered the matter, the Court finds that the amendment of Rule 503 and the Comment thereto as set forth in Exhibit “A” hereto will promote the fair and efficient administration of justice.

IT IS THEREFORE ORDERED that the petition is granted and Rule 503 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 24th day of May, 2004.

/s/ Jess H. Dickinson

JESS H. DICKINSON, JUSTICE, FOR THE
COURT

DIAZ AND GRAVES, JJ., NOT PARTICIPATING.

EXHIBIT "A" TO ORDER

RULE 503. PHYSICIAN AND PSYCHOTHERAPIST-PATIENT PRIVILEGE

(a) Definitions. As used in this rule:

(1) A "*patient*" is a person who consults or is examined or interviewed by a physician or psychotherapist.

(2) A "*physician*" is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) A "*psychotherapist*" is (1) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or (2) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(4) A communication is "*confidential*" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing (A) knowledge derived by the physician or psychotherapist by virtue of his professional relationship with the patient, or (B) confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, his physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) Exceptions.

(1) *Proceedings for Hospitalization.* There is no privilege under this rule in a proceeding to hospitalize the patient for mental illness, if the physician or

psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) *Examination by Order of Court.* If the court orders an examination of the physical, mental or emotional condition of a patient, whether a party or a witness, there is no privilege under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) There is no privilege under this rule as to an issue of breach of duty by the physician or psychotherapist to his patient or by the patient to his physician or psychotherapist.

(4) There is no privilege under this rule for communications, including past and current records of whatever nature, regarding a party's physical, mental, or emotional health or drug or alcohol condition relevant to child custody, visitation, adoption, or termination of parental rights. Upon a hearing in chambers, a judge, in the exercise of discretion, may order release of such records relevant to the custody, visitation, adoption, or termination action. The court may order the records sealed.

(e) In an action commenced or claim made against a person for professional services rendered or which should have been rendered, the delivery of written notice of such claim or the filing of such an action shall constitute a waiver of the privilege under this rule.

(f) Any party to an action or proceeding subject to these rules who by his or her pleadings places in issue any aspect of his or her physical, mental or emotional condition thereby and to that extent only waives the privilege otherwise recognized by this rule. This exception does not authorize ex parte contact by the opposing party.

[Amended October 13, 1992; amended effective May 27, 2004 to remove the privilege in child custody and like proceedings.]

Comment

Subsection (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.

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

Subsection (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 subsection (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 subsection (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.

Subsection (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 subsection (f) will be in personal injury actions, although the exception by its terms is not so limited. This subsection, 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. Subsection (f) is not a procedural rule and cannot be used as such.

[Amended October 13, 1992; amended effective May 27, 2004.]