

Serial: 205777

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99001-SCT

***IN RE: THE RULES OF CIVIL
PROCEDURE***

ORDER

Now before the en banc Court is the Motion to Amend Rule 16 of the Mississippi Rules of Civil Procedure filed by the Advisory Committee on Rules. After due consideration, we find that the motion should be denied.

IT IS THEREFORE ORDERED that the motion is denied.

SO ORDERED, this the 21st day of June, 2016.

/s/ Michael K. Randolph

MICHAEL K. RANDOLPH,
PRESIDING JUSTICE
FOR THE COURT

**TO DENY: RANDOLPH, P.J., LAMAR, KITCHENS, KING, MAXWELL AND
BEAM, JJ.**

**WALLER, C.J., OBJECTS WITH SEPARATE WRITTEN STATEMENT JOINED
BY DICKINSON, P.J., AND COLEMAN, J.; RANDOLPH, P.J., AND MAXWELL,
J., JOIN IN PART.**

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***IN RE: THE RULES OF CIVIL
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**WALLER, CHIEF JUSTICE, OBJECTING TO THE ORDER WITH
SEPARATE WRITTEN STATEMENT:**

¶1. I write separately to explain my vote in favor of the Motion to Amend Rule 16 of the Mississippi Rules of Civil Procedure. The Advisory Committee on Rules (“the Advisory Committee”) filed this motion on September 15, 2011.¹ This is significant, because its members represent a cross-section of the Bar, the judiciary, and academia. They represent some of the best and brightest, and they serve selflessly in carrying out their charge: the Advisory Committee is “to assure not only that all persons should have equal access to the courts of this state, but that the judicial processes are expeditious and cost efficient.”²

¶2. I believe it is worthy to note, from the Motion filed by the Advisory Committee, that this project was originally referred to the Advisory Committee by the Mississippi Supreme

¹ The members of the Advisory Committee include: Colette A. Oldmixon and Charlie Ozier, Mississippi Bar Representatives; Chancellor Jerry Mason and Chancellor Larry Primeaux, Chancery Conference representatives; Judge Al Johnson and Judge Ashley Hines, Circuit Court conference representatives; Judge Larry Wilson, County Court conference representative; Edwin A. Snyder, Prosecutors representative; Phillip W. Broadhead, Public Defenders representative; Charles Mullins and Vic Welsh, Mississippi Access to Justice representatives; Pete Bloss and Ned Currie, Mississippi Defense Lawyers representatives; Deborah Challener, Mississippi College School of Law Representative; Guff Abbott, University of Mississippi School of Law representative; Judge Kenny Griffis, Appellate Court representative; Tammy Shaw, Supreme Court liaison; Farish Percy and Matt Steffey, Reporters for Committee.

² Order Establishing a Permanent Advisory Committee on Rules for the Supreme Court of the State of Mississippi Nov. 9, 1983.

Court. The Motion notes that the referral was made because the Court had received “various inquiries and requests from members of the Mississippi Bar asking for consideration of a rule requiring mandatory scheduling orders/trial settings.” The Committee responded by proposing an amendment to Rule 16 that is “self-executing,” requiring minimum time and involvement by a judge.

¶3. The Court has published the proposed rule for comment four times since the motion was filed almost five years ago. In response to the first two publications, three comments were filed. The third posting modified the Advisory Committee’s proposed amendment to Rule 16 and also included proposed amendments to Rule 26 of the Mississippi Rules of Civil Procedure and Rule 4.04 of the Uniform Rules of Circuit and County Court Practice, and it received a total of eighteen comments: five in favor, six opposed, and six suggesting changes. Significantly, the Mississippi Association for Justice and the Mississippi Defense Lawyers Association filed letters supporting the proposed amendments to Rule 16. Finally, the rule was posted for comment close to the form as originally proposed by the Advisory Committee on April 12, 2016, with one comment suggesting a minor revision.

¶4. Of the referenced negative comments, two were from commercial or collection law firms. Yet cases to collect open accounts or other liquidated debts are exempt under the proposed rule. A chancellor and an attorney also offered objections to the rule being used in chancery courts and divorce matters. But cases filed under Rule 81 of the Mississippi Rules of Civil Procedure are exempted, which include many of the common types of domestic relations cases. Of interest to me was a detailed letter from Judge William Chapman and

Judge John Emfinger of the Twentieth Circuit Court District, in which they provided a detailed explanation of how they set cases for trial and manage their very heavy case load, and provided copies of orders used to manage pretrial litigation. While their system may function efficiently, and they are commended for their initiative, I think there also is a great need for uniformity of pretrial practices across the State, and, where possible, that these pretrial practices be in the spirit and form of the federal rules.

¶5. I respect the votes of my colleagues. But, I am concerned with the long period of time that the proposed rule was under consideration, for which, of course, I am partly responsible.³ And I am concerned with access to justice, in particular for civil cases filed in circuit court, which the proposed rule arguably addresses.

¶6. Despite the fact that the Legislature created positions for two new circuit court judges and one new chancellor, with terms beginning in January of 2011,⁴ dispositions in circuit

³ When I became Chief Justice in 2009, there was one “Rules” Committee established through which all rules were studied and passed for consideration by the Court. In order to facilitate the study and recommendation of new rules, I established three rules committees: “(1) the Rules Committee on Civil Practice and Procedure, (2) the Rules Committee on Criminal Practice and Procedure, and (3) the Rules Committee on the Legal Profession.” William L. Waller, Jr. & Gabe Goza, *The Office of the Chief Justice of the Supreme Court of Mississippi*, 29 Miss. C. L. Rev. 469, 479 (2010). “The Rules Committee on the Legal Profession devotes attention to the Mississippi Code of Judicial Conduct, the Mississippi Rules of Professional Conduct, the Rules Governing Admission to the Mississippi Bar, and the Mississippi Access to Justice Commission.” *Id.*

⁴ See Supreme Court of Mississippi 2011 Annual Report 1, <https://courts.ms.gov/reports/SUPREME%20COURT%202010ANNUAL%20REPORT%20final.pdf> (last visited May 31, 2016).

court have fallen thirty-three percent in the last five years.⁵ This is very troubling to me, and I find this statistic is emblematic of a larger problem: the lack of access to our courts.

¶7. Improving access can be addressed by the Legislative Branch through the creation of more judicial positions or through redistricting.⁶ I have advocated, and this Court has supported, a statewide system of county courts, which would greatly facilitate access to courts for small civil claims. But thus far this has been unsuccessful.

¶8. Even so, the Judicial Branch can enhance access to our courts through the rule making authority of the Court. *Newell v. State*, 308 So. 2d 71 (Miss. 1975). Since September 15, 2011, when the Motion to Amend Rule 16 was filed, the Court has adopted four changes to the Mississippi Rules of Civil Procedure.⁷ And while not a rule change, the Court also repealed the “Official Comments” to the Rules, effective July 1, 2014, and replaced them with “Advisory Committee Notes” under the purview of the Advisory Committee. This gives the Committee a greater, more influential voice. During this same time frame, there have been fourteen amendments to the Federal Rules of Civil Procedure,⁸ even though

⁵ See Annual Report of the Supreme Court of Mississippi 26 (2015). Chancery Court dispositions have decreased from 64,994 dispositions in 2010, to 60,192 dispositions in 2015. Also, Circuit Court civil dispositions have decreased from 22,249 dispositions in 2010, to 14,874 dispositions in 2015. *Id.*

⁶ *Id.*

⁷ On October 25, 2012, the Court amended Rules 34 and 45; on September 25, 2014, the Court amended Rule 3(c); on September 25, 2014, the Court amended Rule 42; and on February 11, 2016, the Court adopted Rule 5.1.

⁸ These amendments include:

- Fed. R. Civ. P. 37 (amended Apr. 16, 2013, eff. Dec. 1, 2013).
- Fed. R. Civ. P. 77 (amended Apr. 25, 2014, eff. Dec. 1, 2014).

modification to the Federal Rules is a longer and more strenuous vetting process, which includes approval by the United States Congress.⁹

¶9. I believe the Court should act with greater dispatch and more deference to the recommendations of the Advisory Committee on their proposals for changes to the official rules. As Justice Byron White of the United States Supreme Court once said: “trial practice is a dynamic profession, and the longer one is away from it the less likely it is that he or she should presume to second-guess the careful work of the active professionals manning the rulemaking committees, work that the Judicial Conference has approved.” Amendments to

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- Fed. R. Civ. P. 1 (amended Apr. 29, 2015, eff. Dec. 1, 2015).
 - Fed. R. Civ. P. 4 (amended Apr. 29, 2015, eff. Dec. 1, 2015).
 - Fed. R. Civ. P. 16 (amended Apr. 29, 2015, eff. Dec. 1, 2015).
 - Fed. R. Civ. P. 26 (amended Apr. 29, 2015, eff. Dec. 1, 2015).
 - Fed. R. Civ. P. 30 (amended Apr. 29, 2015, eff. Dec. 1, 2015).
 - Fed. R. Civ. P. 31 (amended Apr. 29, 2015, eff. Dec. 1, 2015).
 - Fed. R. Civ. P. 33 (amended Apr. 29, 2015, eff. Dec. 1, 2015).
 - Fed. R. Civ. P. 34 (amended Apr. 29, 2015, eff. Dec. 1, 2015).
 - Fed. R. Civ. P. 37 (amended Apr. 29, 2015, eff. Dec. 1, 2015).
 - Fed. R. Civ. P. 45 (amended Apr. 16, 2013, eff. Dec. 1, 2013).
 - Fed. R. Civ. P. 55 (amended Apr. 29, 2015, eff. Dec. 1, 2015).
 - Fed. R. Civ. P. 84 (abrogated Apr. 29, 2015, eff. Dec. 1, 2015).
 - On April 28, 2016, the Supreme Court adopted amendments to the following rules and transmitted them to Congress for review: Fed. R. Civ. P. 4, 6, & 82.

⁹ A suggestion for a change in the rules is sent to the Judicial Conference. The Secretary of the Judicial Conference then refers the suggestion to an Advisory Committee. If approved, the Advisory Committee, with authority from the Standing Committee, circulates the suggestion to the bench and bar, which is followed by a public comment period and public hearings. After consideration, the Advisory Committee submits the amendment to the Standing Committee, which then approves the amendment and recommends approval by the Judicial Conference. If the Judicial Conference approves, it is sent to the United States Supreme Court, which then prescribes and transmits the amendment to Congress to reject, modify, or defer the amendment. *See* H.R. Rep. No. 103-319, at 3 (103rd Cong., 1st Sess. 1993), Civil Rules Amendments Act of 1993; *see also* R. Lawrence Dessem, *Pretrial Litigation: Law, Policy & Practice* 222 (5th ed. 2011).

the Federal Rules of Civil Procedure, 113 S. Ct. 188, 191 (1993) (White, J.).¹⁰ It is with this view in mind that I would grant the Motion to Amend Rule 16 of the Mississippi Rules of Civil Procedure.

DICKINSON, P.J., AND COLEMAN, J., JOIN THIS SEPARATE WRITTEN STATEMENT. RANDOLPH, P.J., AND MAXWELL, J., JOIN THIS SEPARATE WRITTEN STATEMENT IN PART.

¹⁰ The Chief Justice of the United States serves as the presiding officer of the Judicial Conference. The members of the Judicial Conference consist of the chief judge of each judicial circuit, the Chief Judge Court of International Trade, and a district judge from each regional judicial district. It operates through a network of committees. <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> (last visited May 31, 2016).