MISSISSIPPI RULES OF EVIDENCE

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MISSISSIPPI RULES OF EVIDENCE

Adopted Effective January 1, 1986

ORDER ADOPTING THE MISSISSIPPI RULES OF EVIDENCE

SUPREME COURT OF MISSISSIPPI

On May 15, 1985, this Court entered an Order effecting preliminary actions with regard to the adoption of The Mississippi Rules of Evidence. That Order was published in the Southern Reporter, Mississippi Edition, on June 6, 1985, and provided for a ninety (90) day period of time within which interested persons could submit to the Court and to the Advisory Committee On Rules views with respect to The Mississippi Rules of Evidence, or any of them. That ninety (90) day period of time has now elapsed, and the Court has received from a number of interested persons written suggestions as well as other less formal suggestions.

The Court now having heard and considered in their entirety The Mississippi Rules of Evidence, and each of them, and having received the comments and suggestions of interested persons and having carefully and deliberately considered the same, and being of the opinion that the fair and efficient administration of justice in the courts of this state will be promoted hereby, it is

ORDERED:

(a) That The Mississippi Rules of Evidence in the form attached hereto shall be, and the same hereby are adopted as rules of evidence governing proceedings in the courts of the State of Mississippi to the extent and with the exceptions provided in said rules;

(b) that the comments appended to each rule in The Mississippi Rules of Evidence shall be, and they hereby are, adopted as the Official Comments of the Court and these Comments shall be used by all courts as authoritative guides to the interpretation of these Rules;

(c) that The Mississippi Rules of Evidence shall govern all proceedings in any action had on or after January 1, 1986;

(d) that the Clerk of this Court shall be, and [s]he hereby is, authorized and directed to spread this order at large on the minutes of the Court and to forward a certified copy of this order and the rules attached hereto to West Publishing Company for publication as soon as is reasonably practicable in a forthcoming edition of the advance sheets of the Southern Reporter, Mississippi cases, the official reporter of decisions of this Court;

(e) that the Advisory Committee on Rules and each member thereof shall be, and they hereby are, commended for their outstanding, competent and diligent work in preparing and submitting to the Court The Mississippi Rules of Evidence together with the official comments thereto;

(f) that the Court expresses its appreciation to the Mississippi State Bar and the Mississippi Trial Lawyers Association and the members of each such organization for having filed with the Court petitions for the adoption of proposed Rules of Evidence and their having furnished to the Court insightful comments and critique and other assistance in the development of The Mississippi Rules of Evidence.

ORDERED this 24th day of September, 1985.

FOR THE COURT

Neville Patterson
Chief Justice

ARTICLE I. GENERAL PROVISIONS

RULE 101. SCOPE

These rules govern proceedings in the courts of the State of Mississippi to the extent and with the exceptions stated in rule 1101.

Comment

This rule requires that The Mississippi Rules of Evidence be applicable both in civil and criminal cases. Rule 1101 delineates more specifically what judicial proceedings are exempted from the rules' coverage.

RULE 102. PURPOSE AND CONSTRUCTION

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Comment

Rule 102 is a statement of the public policy to be served by a uniform set of rules. It is identical to Rule 102 of the Federal Rules of Evidence as well as numerous state codes.

RULE 103. RULINGS ON EVIDENCE

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of Proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Continuing objections to evidence of the same or a similar nature or subject to the same or similar objections may in the discretion of the trial judge be allowed.

(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain Error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Comment

Rule 103 concerns the making of an evidentiary record for purposes of appeal.

(a) Subsection (a) reflects existing Mississippi practice. (1) The objection must state the specific ground of objection unless the specific ground is apparent from the context. This adopts and carries forward the approach taken in *Murphy v. State*, 453 So.2d 1290, 1293-1294 (Miss. 1984). (2) By the same token, when a party objects to the exclusion of evidence, he must make an offer of proof to the court, noting on the record for the benefit of the appellate court what evidence the trial judge excluded. *See Brown v. State*, 338 So.2d 1008 (Miss. 1976); *King v. State*, 374 So.2d 808 (Miss.1979). Federal Rule of Evidence 103, which is identical, has been interpreted to have no effect on the harmless error principle.

Subsection (a) also retains the existing practice of recognizing continuing objections, where allowed by the trial judge, as a viable means of preserving a point for appeal. *See Hughes v. State*, 470 So.2d 1046, 1048 n. 1 (Miss. 1985).

Harris v. Buxton T.V., Inc., 460 So.2d 828 (Miss. 1984) held that no offer of proof was necessary where a party was improperly prohibited from cross-examining a witness. Rule 103 (a)(2) does not affect this holding.

(b) Rule 103 (b) is consistent with pre-rule Mississippi case law which provided that a trial judge was entitled to explain his rulings. *Ratliff v. State*, 313 So.2d 386 (Miss. 1975); *Ladnier v. State*, 273 So.2d 169 (Miss. 1973).

The court may also permit the aggrieved party to preserve the record by dictating into the record a statement of the evidence offered but excluded. This accords with the rule announced in such cases as *Murray v. Payne*, 437 So.2d 47, 55 (Miss. 1983).

(c) Subsection (c) is an attempt to protect the jury from exposure to inadmissible evidence. It conforms to Mississippi practice. *See Cutchens v. State*, 310 So.2d 273 (Miss. 1975).

(d) Subsection (d), regarding plain error, is a restatement of that doctrine as it existed in pre-rule practice. It reflects a policy to administer the law fairly and justly. A party is protected by the plain error rule when (1) he has failed to perfect his appeal and (2) when a substantial right is affected. Miss.Sup.Ct.R. 6(b) and 11 permit a plain error rule: "The Court may, at its own option, notice a plain error not assigned or distinctly specified." *See also Boyd v. State*, 204 So.2d 165 (Miss. 1967). If a party persuades the court of the substantial injustice that would occur if the rule were not invoked, the court may invoke the rule. *See Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975). The plain error rule may be applied in either criminal cases or civil cases. *See House v. State*, 445 So.2d 815 (Miss. 1984).

RULE 104. PRELIMINARY QUESTIONS

(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. If offeror fails to meet the condition, the objector may request the jury be instructed to disregard the evidence; however, such request shall not be a prerequisite to motion for mistrial. For purposes of punitive damages, proof of net worth shall not be offered until the close of evidence and the court has determined that issue will be submitted to the jury.

(c) Hearing of Jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by Accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and Credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Comment

(a) Subsection (a) recognizes that a significant amount of a trial judge's responsibility is to make preliminary rulings. For instance, the judge, in cases where there is a question of the witness's competency, must first make a determination that the witness is competent before the witness is allowed to testify concerning the issue at bar. Other preliminary questions might concern privileges, the exclusionary rule, the voluntariness of confessions, and qualifications of experts. *In House v. State*, 445 So.2d 815 (Miss. 1984), the Supreme Court set forth extremely explicit guidelines for the trial court to use in determining whether a witness who has been hypnotized may testify in a criminal prosecution about matters explored while under hypnosis.

Oftentimes preliminary matters will involve a determination of facts. In such instances, the judge is the trier of facts. *See* FRE 104, Advisory Committee Notes. When the judge hears evidence on these preliminary questions, he is not bound under Rule 104 to apply the rules of evidence. The one exception to this, which is explicitly stated, is the evidentiary law relating to privileges.

(b) Subsection (b) refers to conditional relevancy. If before we determine X, we must determine that condition Y exists, then the court must admit evidence of the condition precedent. The evidence is admitted only after the judge makes an initial determination that a sufficient predicate has been laid. If later the judge believes that the condition was never fully established, he may withdraw the preliminary evidence from the jury's consideration. It is within the judge's discretion as to how the proof should be presented. *See* FRE 104, Advisory Committee Notes.

(c) Subsection (c) is designed to prevent the jury from hearing what may be prejudicial evidence which may be later ruled inadmissible. Rather than exposing the jury to this evidence, the rule requires that the admissibility hearing be held outside the jury's presence. This procedure must always be followed in cases where the preliminary matter under discussion is the voluntariness of a criminal defendant's confession. This is in accord with long-standing Mississippi practice. *See*, e.g., *Hall v. State*, 427 So.2d 957 (Miss. 1983); *McElroy v. State*, 204 So.2d 463 (Miss. 1967); *see also Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L.Ed.2d 908 (1964). The admissibility of possibly illegally obtained evidence

may be another matter to be considered outside the jury's presence. To protect the criminal defendant, the rule provides he may have a hearing outside the jury's presence at his request. In other cases, the judge's discretion governs. For instance, in determining the competency of a child to testify, the judge would most likely not dismiss the jury. To dismiss the jury in such a case would be needlessly time-consuming.

(d) Subsection (d) allows the defendant to challenge preliminary questions without exposing himself to a full cross-examination. Thus, if the defendant in a hearing to consider a motion to suppress evidence or in a hearing to consider the voluntariness of a confession testifies, the prosecutor on cross-examination may not inquire into other issues. This subsection is necessary to provide a limitation on the wide-open cross-examination provision of Rule 611(b). Subsection (d) does not address the issue of whether a defendant's testimony at a hearing on a preliminary matter may be used by the prosecutor at trial. *But see Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L.Ed.2d 1 (1971).

(e) Subsection (e) is self-explanatory. For a similar provision *see* FRE 104 (e).

RULE 105. LIMITED ADMISSIBILITY

If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, unless expressly waived or rebutted, shall restrict the evidence to its proper scope, contemporaneously instruct the jury accordingly, and give a written instruction if requested.

RULE 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Comment

This rule is a codification of the common law doctrine of completeness. The rule is already codified with regard to depositions in M.R.C.P. 32(a)(4). However, Rule 106 is somewhat narrower than Mississippi common law. The rule only applies the doctrine of completeness to written or recorded statements of a specific document. Under Mississippi

case law the rule of completeness is extended to other writings and even to oral statements. *See Davis v. State*, 230 Miss. 183, 92 So.2d 359 (1957); *Sanders v. State*, 237 Miss. 772, 115 So.2d 145 (1969). Such a rule attempts to prevent misleading the jury by taking evidence out of context.

ARTICLE II. JUDICIAL NOTICE

RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When Discretionary. A court may take judicial notice, whether requested or not.

(d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing Jury. In a civil action or proceeding the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Comment

(a) The entire codification of the law of judicial notice is in Rule 201. Professor Kenneth Davis, in his now famous article, "An Approach to Problems of Evidence in the Administrative Process," 65 Harv.L.Rev. 364 (1942), divided judicial notice into two parts, adjudicative and legislative. Adjudicative facts are easily understood; they are specific to the

litigation. Legislative facts, on the other hand, are more amorphous. To determine legislative facts one must look at the public policy or policies involved in judge-made law. Despite the existence of two types of judicial notice, Rule 201 only governs judicial notice of adjudicative facts. A court's application of judicial notice of legislative facts is more an inherent part of the judicial process rather than an evidentiary matter.

(b) Subsection (b) provides that only certain kinds of facts may be susceptible to judicial notice. The first kind of fact that can be judicially noticed is one that is commonly known in the jurisdiction in which the court sits. The judge himself need not know the fact. Indeed, it is altogether irrelevant whether he does. The test is whether the fact is common knowledge in the area. The use of judicial notice for matters of common knowledge has long been practiced in Mississippi. On what street the local department store is located is the kind of commonly known fact of which a court may take judicial notice. The second kind of fact susceptible to judicial notice is one readily ascertainable. This would include such items as maps, census data, mortality tables, dates and time, and history. *See Ellis and Williams*, Miss. Evid. § 12-2 and the cases cited therein. *See also Nicketta v. National Tea Co.*, 338 Ill.App. 159, 87 N.E.2d 30 (1949), and *Walls v. Mississippi State Bar*, 437 So.2d 30, 33 (Miss. 1983).

Subsection (b) does not allow judicial notice to be used when the fact is a dubious one or one in controversy.

(c), (d) Subsections (c) and (d) govern the use of the judicial discretion. The judge has discretion to take judicial notice of adjudicative facts, regardless of whether a party has requested him to do so. The basis for the exercise of such discretion is to expedite matters. On occasion a judge may be required to take judicial notice. If a party makes a request and supplies the judge with the necessary information, he must take judicial notice.

(e) Subsection (e) provides for a procedure not formerly required in Mississippi. By providing an opportunity for a hearing on the matter of judicial notice, the rule is a safeguard for fairness. If a party requests an opportunity to be heard, under the rule he must be granted that opportunity. Because frequently there is no advance notice that judicial notice will be taken, a party has a right to be heard even after judicial notice has been taken.

(g) Subsection (g) contains an important deviation from pre-rule Mississippi practice. The common law rule in Mississippi had been that evidence admitted pursuant to judicial notice was not conclusive. Subsection (g), insofar as it concerns criminal cases, is not inconsistent with that rule. However, in civil cases under subsection (g) the jury must accept such evidence as conclusive. The jury in criminal cases may choose to accept the evidence

or reject it. This avoids any possible allegation that the defendant's right to a jury trial under the Sixth Amendment was violated.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

RULE 301. PRESUMPTIONS IN GENERAL IN CIVIL ACTIONS AND PROCEEDINGS

In all civil actions and proceedings not otherwise provided for by act of the Legislature or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

Comment

Rule 301 is only concerned with presumptions in civil proceedings. Once the party with the burden of proof has raised a presumption, a motion to dismiss by the opposing party will not be ordered. If the opposing party enters no evidence to rebut the presumption, then the court should instruct the jury that it may accept the presumption. The presumption does not disappear until credible or substantial evidence has been produced by the opposing party.

ARTICLE IV. RELEVANCY AND ITS LIMITS

RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Comment

Rule 401 makes no distinction between relevancy and materiality. The concept of materiality is merged into the concept of relevancy and retains no independent viability. Evidence is relevant if it is likely to affect the probability of a fact of consequence in the case. *Mississippi State Highway Commission v. Dixie Contractors, Inc.*, 375 So.2d 1202, appeal after remand 402 So.2d 811 (1979). If the evidence has any probative value at all, the

rule favors its admission. Such has been the experience under Federal Rule of Evidence 401 which is identical to this rule. *Young v. Illinois Cent. Gulf R. Co.*, 618 F.2d 332 (5th Cir. 1980). Evidence to prove a collateral fact is relevant if the collateral fact has a tendency to prove or disprove an issue in the case. *American Potash & Chemical Corp. v. Nevins*, 163 So.2d 224, 249 Miss. 450 (1964).

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Mississippi, or by these rules. Evidence which is not relevant is not admissible.

Comment

This rule introduces no new practice to existing Mississippi law. Relevant evidence may be rendered inadmissible for constitutional reasons or for reasons specified in Articles V and VI of these rules.

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Comment

Relevant evidence may be inadmissible when its probative value is outweighed by its tendency to mislead, to confuse, or to prejudice the jury. If the introduction of the evidence would waste more time than its probative value was worth, then a trial judge may rightly exclude such otherwise relevant evidence. By providing for the exclusion of evidence whose probativeness is outweighed by prejudice, Mississippi is following existing federal and state practice. *U.S. v. Renfro*, 620 F.2d 497 (5th Cir. 1980), *cert.* denied 449 U.S. 921, 101 S. Ct. 321, 66 L.Ed.2d 149 (1980). Such a rule also keeps collateral issues from being injected into

the case. *Hannah v. State*, 336 So.2d 1317 (Miss. 1976), *cert.* denied, 429 U.S. 1101, 97 S. Ct. 1126, 51 L.Ed.2d 551 (1977); *Coleman v. State*, 198 Miss. 519, 23 So.2d 404 (1945). This rule also gives the trial judge the discretion to exclude evidence which is merely cumulative. *Carr v. State*, 208 So.2d 886 (Miss. 1968).

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Comment

(a) Character evidence may arise in three different ways: (1) when character is an issue in a case; (2) when the character of a witness is impugned for lack of veracity; and (3) when the character of a party is being used as the basis for an inference that he behaved in the instant case as he did on prior occasions.

Character is straightforwardly introduced into evidence when it is a direct issue in the case. A defamation case exemplifies when character is a direct issue. *New Orleans Great Northern R. v. Frazer*, 158 Miss. 407, 130 So. 493 (1930).

With regard to character evidence relating to the veracity of witnesses, Rule 404 refers one to Rules 607, 608, and 609.

The difficulty surrounding character evidence is with regard to its inferential use. When a party attempts to prove that a person has a certain character trait and that he acted in accordance with it, the court will exclude the testimony. To do otherwise is to prejudice the person, to render him in the eyes of jurors liable, not because of what he did or did not do in the instant case, but because of what he has done or failed to do in the past. *Floyd v. State*, 166 Miss. 15, 148 So. 226 (1933); *Eubanks v. State*, 419 So.2d 1330 (Miss. 1972); *Riley v. State*, 254 Miss. 86, 180 So.2d 321 (1965). This particular kind of circumstantial evidence most often appears in criminal cases. The general rule serves as a bar to the introduction of the inferential evidence. *U.S. v. Cochran*, 546 F.2d 27 (5th Cir. 1977); *Davis v. State*, 431 So.2d 468 (Miss. 1983).

Ordinarily a victim's character is irrelevant. The fact that a "bad" man rather than a "good" man was murdered or beaten is inconsequential. *Spivey v. State*, 58 Miss. 858 (1881). Under specific circumstances, however, the character of a victim may be relevant. This would most likely arise in instances where the defendant claims that the victim was the initial aggressor and that the defendant's actions were in the nature of self-defense. In order to prove this the defendant must offer evidence of an overt act perpetrated against him by the victim. *Freeman v. State*, 204 So.2d 842 (Miss. 1967). Having proved the act, the defendant may then offer proof of the victim's character. *Shinall v. State*, 199 So.2d 251 (Miss. 1967), cert. denied 389 U.S. 1014 [88 S. Ct. 590, 19 L.Ed.2d 660] (1967), outlined the permissible exceptions which would still be applicable under this rule. The recognized exceptions are: "(A) when, from the circumstances of the case, it is a part of the *res gestae*; . . . (B) where the evidence of the homicide is wholly circumstantial . . .; (C) where it is doubtful as to who the aggressor was at the time of the homicide . . .; or (D) where the immediate circumstances of the killing render it doubtful as to whether or not the act was justifiable."

(b) Against the general prohibition of producing evidence of prior offenses or actions to show that the party acted in conformity with past behavior, is posited a list of exceptions. These past acts introduced into evidence may be ones for which the person in question was either convicted or not convicted. All of the exceptions in Rule 404(b) have been recognized and applied on numerous occasions by the Mississippi Supreme Court. Evidence of another crime, for instance, is admissible where the offense in the instant case and in the past offense are so inter-connected as to be considered part of the same transaction. *Neal v. State*, 451 So.2d 743 (Miss. 1984). The court has consistently recognized that evidence of a prior crime or act may be admitted to show identity, knowledge, intent, or motive. *Carter v. State*, 450 So.2d 67 (Miss. 1984).

It should be noted that the exceptions listed in Subsection (b) are not exclusive.

RULE 405. METHODS OF PROVING CHARACTER

(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

Comment

Once the question of admissibility of character evidence is resolved under Rule 404, it is necessary to turn to Rule 405 for the correct methodology. Rule 405 provides two basic methods of proving character. One method, pursuant to Rule 405 (b) is reserved for those cases in which character is an essential part of the issue. In this situation, proof of specific instances of conduct may be introduced into evidence. Evidence of specific conduct is limited to cases in which character is an issue.

405 (a) provides the methods for proving character in cases in which character is an issue but more importantly in cases in which character evidence is being used inferentially. If permissible under Rule 404, the character evidence may be proved by opinion or reputation. Mississippi common law previously permitted such evidence to be introduced through reputation evidence. *Rogers v. State*, 204 Miss. 891, 36 So.2d 155 (1948). Recognizing that reputation evidence is nothing more than the opinion of a selected group, Rule 405 broadens the methodology to allow proof of character by opinion.

While 405(a) limits proof of character to reputation or opinion evidence on direct examination, it does provide that the witness may be cross-examined regarding specific acts of conduct. There are two sound reasons for permitting this type of cross examination. If the witness on cross-examination professes no knowledge about specific acts, his qualifications to state opinion or reputation are impugned. If the witness admits knowledge of specific bad acts, then he has been impeached. *Magee v. State*, 198 Miss. 642, 22 So.2d 245 (1945).

RULE 406. HABIT; ROUTINE PRACTICE

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Comment

Habit is considered to be an individual's usual method or manner of doing things. Routine practice refers to a group or institution's habit. *See* McCormick, *Evidence*, 3rd Ed., 162. Thus, we speak of a person's habit and the routine practice or custom of an institution. Mississippi has long recognized that under appropriate circumstances habit and custom are relevant evidence. Under Rule 406, evidence of habit or routine practice can be used as circumstantial evidence. A party may introduce evidence of a person's habit to imply that he probably acted in this instance in conformity with his habit.

In Mississippi under the common law such evidence would be inadmissible if there were no eyewitnesses. Rule 406 specifically provides to the contrary. *See* FRE 406, Advisory Committee's Note.

The evidence that a business acted in conformity with its routine practice is relevant. Of course, rebuttal is always permitted.

RULE 407. SUBSEQUENT REMEDIAL MEASURES

When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for other purposes, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or for impeachment.

[Amended effective July 1, 2011.]

Comment

This rule prohibits evidence of subsequent repairs to be introduced for the purpose of proving negligence or liability, including products liability. However, it may be admitted into evidence for another purpose. The second sentence of the rule discusses its limitations. The rule mentions ownership, control, feasibility and impeachment as admissible purposes, but this is not an exclusive list of permitted grounds, only an illustrative list.

The primary reason for this rule is a sound one. If such evidence were admissible on the issue of culpability, then the person responsible would have less incentive to correct the defect. By excluding subsequent repairs and remedies, the rule encourages the owner to render the property safer, or at least does not discourage repairs. The rule applies only to remedial changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant before the "event" causing "injury or harm" does not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. Courts applying Rule 407 have excluded evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees.

[Comment amended effective July 1, 2011.]

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Comment

Evidence of an offer to compromise a claim is not receivable in evidence as an admission of either the validity or invalidity of the claim. The rule is based on two reasons. First, the evidence is irrelevant, since the offer may be motivated by a desire for peace rather than by a recognition of liability. Secondly, public policy favors the out-of-court compromises and settlement of disputes. The same policy underlines M.R.C.P. 48 which provides that evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

Pre-rule practice in Mississippi was similar to the rule with one significant difference. Under Rule 408 statements of admission facts made in negotiations are excluded from evidence. In Mississippi, an admission made in a settlement negotiation has been admissible against the declarant. *See McNeer & Dood v. Norfleet*, 113 Miss. 611, 74 So. 577 (1917).

Rule 408 only excludes offers when the purpose is proving the validity or invalidity of the claim or amount. Therefore, an offer for another purpose may well be admissible at trial.

Also, it is important to note that offers which are made in settlement negotiations are not necessarily excluded if they are otherwise discoverable.

RULE 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Comment

This rule fills a gap in Mississippi's evidence law. There exists no pre-rule Mississippi case on the relevance of offers by a defendant to pay plaintiff's medical expenses.

RULE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn;

(2) A plea of nolo contendere;

(3) Any statement made in the course of any proceedings under Mississippi statutory or rule of court provisions regarding either of the foregoing pleas; or

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or which results in a plea of guilty later withdrawn.

However, such a statement is admissible (1) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (2) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

Comment

Under existing Mississippi law, a plea of nolo contendere by a defendant is not admissible against him later in either a civil case or a criminal case. *See Keys v. State*, 312 So.2d 7 (Miss. 1975). (A plea of nolo contendere is only available in misdemeanor cases). Rule 410 is consistent with Mississippi law by rendering inadmissible both guilty pleas which are withdrawn and statements made in a judicial proceeding regarding a plea of guilty which is withdrawn or a plea of nolo contendere. *Sanders v. State*, 435 So.2d 1177 (Miss. 1983) and Rule 3.03 (6), Uniform Criminal Rules of Circuit Court Practice.

The exceptions to this rule of inadmissibility are limited. The first exception covers situations in which the defendant testifies at trial that the prosecutor or police made a statement expressing doubt as to defendant's guilt. In such an instance, the state would be able to introduce the defendant's statement or plea to rebut his testimony.

RULE 411. LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Comment

One of the primary reasons for excluding evidence of insurance or the lack of it is to prevent the jury from deciding the case on improper grounds. Rule 411 reflects existing Mississippi practice. Evidence of the existence of defendant's insurance is irrelevant as to his negligence and admission of such evidence may be grounds for a mistrial. *See Mid-Continent Aircraft Corp. v. Whitehead*, 357 So.2d 122 (Miss. 1978); *Petermann v. Gray*, 210 Miss. 438, 49 So.2d 828 (1951). Evidence of liability insurance may be relevant for other purposes, such as proof of agency, ownership, or bias.

RULE 412. SEX OFFENSE CASES; RELEVANCE OF VICTIM'S PAST BEHAVIOR

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sexual offense against another person, reputation or opinion evidence of the past sexual behavior of an alleged victim of such sexual offense is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sexual offense against another person, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is:

(1) Admitted in accordance with subdivisions (c)(1) and (c)(2) hereof and is constitutionally required to be admitted; or

(2) Admitted in accordance with subdivision (c) hereof and is evidence of

(A) Past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen, pregnancy, disease, or injury; or

(B) Past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which a sexual offense is alleged; or

(C) False allegations of past sexual offenses made by the alleged victim at any time prior to the trial.

(c) (1) If the person accused of committing a sexual offense intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior or evidence of past false allegations made by the alleged victim, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which the sexual offense is alleged.

[Amended effective March 1, 1989.]

Advisory Committee Historical Note.

Effective March 20, 1995, the Comment to Rule 412 was amended to note the repeal of a statute. 648-651 So.2d XXVI (West Miss.Cas. 1995).

Effective March 1, 1989, Rule 412 was amended to add the terms "pregnancy" and "disease" to 412(b)(2)(A) and to add a new subsection 412 (b)(2)(C). 536-538 So. 2d XXXII (West Miss. Cas. 1989).

Comment

(a) Subsection (a) is designed to protect the privacy of the alleged victim by excluding opinion or reputation evidence of the victim's past sexual experience. This rule is applicable in all criminal cases in which a defendant is accused of a sexual offense against another person. This includes, but is not limited to, offenses prohibited by M.C.A. § 97-3-95.

(b) Section (b) excludes other evidence of the victim's past sexual experience with some exceptions. Specific instances of sexual conduct are admissible to determine whether the defendant is the source of semen, pregnancy, disease or injury. Furthermore, specific instances of sexual conduct between the alleged victim and the defendant are relevant on the issue of consent.

(c) Subsection (c) provides that notice be given if the defendant intends to offer evidence of specific instances of the alleged victim's sexual conduct. The defendant does this by making a written motion to offer the evidence, which includes an offer of proof. The court then holds a hearing in chambers to decide the evidence's admissibility.

If otherwise admissible, nothing in this rule precludes evidence of past false allegations by the alleged victim of past sexual offenses. "Past false allegations" shall include any such allegations made prior to trial. This provision is intended to protect the defendant's Sixth Amendment rights.

Rule 412(a) and (b) adapts the language of Uniform Rule of Evidence 412. In its procedural requirements Rule 412 bears similarity to M.C.A. § 97-3-70 (repealed July 1, 1991), the Mississippi rape-shield law enacted in 1977. *See also* M.C.A. §97-3-68; *Johnston v. State*, 376 So.2d 1343 (Miss. 1979).

[Amended effective March 1, 1989; March 20, 1995.]

ARTICLE V. PRIVILEGES

RULE 501. PRIVILEGES RECOGNIZED ONLY AS PROVIDED

Except as otherwise provided by the United States Constitution, the State Constitution, by these rules, or by other rules applicable in the courts of this state to which these rules apply, no person has a privilege to:

(1) Refuse to be a witness;

(2) Refuse to disclose any matter;

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

Advisory Committee Historical Note

Effective March 20, 1995, the Comment to Rule 501 was amended to delete the second paragraph. 648-651 So.2d XXVI (West Miss.Cas.1995).

Comment

Rules 501 through 505 are largely modeled on the draft version of the Federal Rules of Evidence which was originally approved by the United States Supreme Court. Before enacting the Federal Rules of Evidence, Congress deleted the rules concerning privilege on the ground that the rules invaded an area of state law. The federal courts, however, often refer to these deleted rules, which are now labeled Federal Standards. Although they have no binding effect on the federal courts, they do serve as guidelines.

[Amended March 20, 1995.]

RULE 502. LAWYER-CLIENT PRIVILEGE

(a) Definitions. As used in this rule:

(1) A "*client*" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A "*representative of the client*" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or an employee of the client having information needed to enable the lawyer to render legal services to the client.

(3) A "*lawyer*" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "*representative of the lawyer*" is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.

(5) A communication is "*confidential*" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) Who May Claim the Privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) *Furtherance of Crime or Fraud*. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants Through Same Deceased Client*. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) *Breach of Duty by a Lawyer or Client*. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) *Document Attested by a Lawyer*. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) *Joint Clients*. As to a communication relevant to a matter of common interest between or among two (2) or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

Comment

Subsection (a) defines pertinent terms: who is a lawyer, who is a client, who are their representatives. These definitions clarify Mississippi law. The only existing statute relating to attorney-client relationship is M.C.A. § 73-3-37 which, among other things, includes a provision that one of an attorney's duties is "to maintain inviolate the confidence and, at every peril to themselves, to preserve the secrets of their clients. . . ."

The term "client" includes individuals, corporations and associations, and governmental bodies. Mississippi decisional law is in accord with Rule 502(a)(1) in that the privilege protects communications between an attorney and one who consults him with a view towards retaining him, but who eventually decides not to employ him. *See Perkins v. Guy*, 55 Miss. 153 (1877). The services provided by the attorney must be legal services in order to be cloaked with the privilege. Services which are strictly business or personal do not enjoy the privilege. *See* McCormick, *Evidence*, 92. The Mississippi court has not recognized the privilege in those cases in which the attorney is merely a scrivener. *Rogers v. State*, 266 So.2d 10 (Miss. 1972).

Rule 502(a)(2) defines representatives of a client. This takes on particular significance in regards to corporate clients. This group of employees who may be a client's representatives is larger than the "control group". The "control group" was formerly one of

the leading tests for determining which corporate employees had the benefit of the privilege. *See Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L.Ed.2d 584 (1981), in which the Supreme Court construed the language of the Federal Rules of Evidence as invalidating the control group test and so rejected it.

The definition of lawyer in Rule 502(a)(3) covers any person licensed to practice law in any state or nation. It includes persons who are not lawyers but whom the client reasonably believes are lawyers.

The definition of representative of the lawyer in Rule 502(a)(4) is broadly designed to include the lawyer's employees and assistants. It also includes experts that the lawyer has hired to assist in the preparation of the case. It does not extend to an expert employed to be a witness. This conforms to existing Mississippi practice. *Dictum* in *Wilburn v. Williams*, 193 Miss. 831, 11 So.2d 306 (1943), indicated that the court might have followed such a definition if the issue was before it.

A communication which takes place in the presence of a third party is not confidential unless it complies with the statement in Rule 502 (a)(5). If the third party does not fall within these categories in this subsection, his presence deems the communication not to be confidential. *See Taylor v. State*, 285 So.2d 172 (Miss. 1973); *Ferrel v. State*, 208 Miss. 539, 45 So.2d 127 (1950).

The test for confidentiality is intent. Thus, a communication made in public cannot be considered confidential. Intent can be inferred from the particular circumstances.

Subsection (b) is a statement of the rule. The rule is drafted in such a way as to prevent eavesdroppers from testifying about the privileged communication. *See* the Advisory Committee's Notes to Deleted FRE 503 [which is identical to U.R.E. 502(b)].

The privilege extends to statements made in multiple party cases in which different lawyers represent clients who have common interests. Each client has a privilege as to his own statements. The FRE Advisory Committee's Notes to Deleted Rule 503 state that the rule is inapplicable in situations where there is no common interest to be promoted by a joint consultation or where the parties meet on a purely adversary basis.

Subparagraph (b) provides that the privilege includes lawyer to client communications as well as client to lawyer communications. *See Barnes v. State*, 460 So.2d 126, 131 (Miss. 1984).

Subsection (c) establishes that the privilege belongs to the client or his personal representative. *Barnes v. State*, 460 So.2d 126, 131 (Miss. 1984). The lawyer's claim is limited to one made on behalf of the client; he himself has no independent claim. *See United States v. Jones*, 517 F.2d 666 (5th Cir.1974).

Subsection (d) excludes certain instances from the privilege. Rule 502(d)(1) does not extend the privilege to advice in aid of a future crime or fraud. The provision that the client knew or reasonably should have known of the criminal or fraudulent nature of the act is designed to protect the client who is mistakenly advised that a proposed action is lawful. *See* McCormick, *Evidence*, 75. Existing law in Mississippi on this point is unclear. *Dicta* in two l9th century cases suggest that the privilege did apply to protect statements regarding the client's motives in fraudulent schemes. *See Parkhurst v. McGraw*, 24 Miss. 134 (1852); *Lengsfield and Co. v. Richardson and May*, 52 Miss. 443 (1876). Additionally, the federal appellate court in *Hyde Construction Co. v. Koehring Co.*, 455 F.2d 337 (5th Cir. 1972), has determined that the Mississippi courts would allow the privilege when an attorney, acting as the client's alter ego, commits a tort or fraud. It is uncertain, if this is an accurate reflection of the scarce Mississippi law on the point, but clearly under Rule 502(d)(1) the privilege in such a case would not apply.

Rule 502(d)(2) permits no privilege when the adversaries in a case claim the privilege from the same deceased client. The general rule is that the privilege survives death and may be claimed by the deceased's representative. However, this rule makes no sense in some cases; for instance, in will contests when various parties claim to be the representative of the decedent. Only at the end of the litigation will the court have determined who is the deceased's successor, and until it has made that determination, neither party is entitled to invoke the privilege.

Rule 502(d)(3) permits the use of statements made between a lawyer and his client when a controversy later develops between them, such as in a dispute over attorney's fees or legal malpractice.

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.]

Advisory Committee Historical Note.

Effective October 13, 1992, Rule 503(f) was amended to state that the rule is inapplicable to contexts other than hearings or discovery proceedings and to delete reference to workers' compensation proceedings. 603-605 So. 2d XXI (West Miss. Cas. 1993).

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.]

RULE 504. HUSBAND-WIFE PRIVILEGE

(a) Definition. A communication is confidential if it is made privately by any person to that person's 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 spouse, or former spouse, from testifying as to any confidential communication between that person and that person's spouse.

(c) Who May Claim the Privilege. The privilege may be claimed by either spouse in that spouse's 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 (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) 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.]

Advisory Committee Historical Notes

Effective April 3, 2003, Rule 504 was amended to effect technical changes. ____

So.2d (West Miss.Cas.2003).

Effective May 2, 2002, Rule 504(d) and its Comment were amended to remove the privilege in civil actions between the spouses. 813-815 So.2d XXI (West Miss. Cases2002).

Rule 504(d) was amended in *Fisher v. State*, 690 So. 2d 268, 272 (Miss. 1996) to substitute "any minor child" for "a child of either" and to effect technical changes. The amendment applied prospectively upon publication (May 1, 1997, advance sheet) in West's *Southern Reporter*.

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

[Comment amended March 20, 1995; May 2, 2002.]

RULE 505. PRIEST-PENITENT PRIVILEGE

(a) Definitions. As used in this rule:

(1) A "*clergyman*" is a minister, priest, rabbi or other similar functionary of a church, religious organization, or religious denomination.

(2) A communication is "*confidential*" if made privately and not intended for further disclosure except in furtherance of the purpose of the communication.

(b) General Rule of Privilege. A person has a privilege to refuse to disclose and prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(c) Who May Claim the Privilege. The privilege may be claimed by the person,

by his guardian or conservator, or by his personal representative if he is deceased. The clergyman shall claim the privilege on behalf of the person unless the privilege is waived.

(d) Other. A clergyman's secretary, stenographer, or clerk shall not be examined without the consent of the clergyman concerning any fact, the knowledge of which was acquired in such capacity.

Comment

Rule 505 is a restatement of M.C.A. § 13-1-22. The definition of a "clergyman" is broad but workable. It is fair to say that the term refers to clergy who are regularly engaged in activities of established denominations. It is not broad enough to include all sorts of "self-denominated ministers."

Rule 505, like M.C.A. § 13-1-22, cloaks the clergyman's secretary, stenographer, or clerk with the privilege should they, in their professional capacities, learn of the communication. The clergyman must consent before his employee may testify about the communication, but it would seem that his consent is meaningless if the penitent has not already waived the privilege.

ARTICLE VI. WITNESSES

RULE 601. GENERAL RULE OF COMPETENCY

Every person is competent to be a witness except as restricted by the following:

(a) In all instances where one spouse is a party litigant the other spouse shall not be competent as a witness without the consent of both, except as provided in Rule 601(a)(1) or Rule 601(a)(2):

(1) Husbands and wives may be introduced by each other in all cases, civil or criminal, and shall be competent witnesses in their own behalf, as against each other, in all controversies between them;

(2) Either spouse is a competent witness and may be compelled to testify against the other in any criminal prosecution of either husband or wife for a criminal act against any child, for contributing to the neglect or delinquency of a child, or desertion or nonsupport of children under the age of sixteen (16) years, or abandonment of children.

(b) A person appointed by a court as required by state law to make an appraisal in an eminent domain proceeding for the immediate possession of land shall not be eligible to testify in the trial of such case, and the report of such court appointed appraiser shall not be admissible in evidence during such trial.

[Amended November 16, 1988, effective retroactive to January 1, 1986; amended January 31, 1990; amended effective July 1, 1998.]

Advisory Committee Historical Note.

Effective October 23, 1997, former Rule 601(b), which precluded testimony from convicted perjurers, was abandoned in *Fuselier v. State*, 702 So.2d 388. Effective July 1, 1998, the Comment was amended to reflect this decision. 706-708 So.2d XLI (West Miss.Cas.1998).

Effective March 20, 1995, the Comment to Rule 601 was amended to delete the reference to a repealed statute. 648-651 So.2d 651 So.2d XXVI (West Miss.Cas.1995).

Effective January 31, 1990, Rule 601 and its Comment were amended to reflect the decision in *Hudspeth v. State Highway Com'n of Mississippi*, 534 So.2d 210 (Miss.1990).

Comment

This rule sets out the special provisions which render certain persons incompetent to testify. As originally written Rule 601 excepted two classes from competency, spouses pursuant to M.C.A. § 13-1-5 and persons convicted of perjury or subornation of perjury pursuant to M.C.A. § 13-1-11. Rule 601 was subsequently amended in 1990 to delete statutory references. Subsection (a) retains the substance of superseded M.C.A. § 13-1-5. Former Subsection (b) retained the substance of superceded M.C.A. § 13-1-11 as it pertained to persons convicted of perjury or subornation of perjury. In *Fuselier v. State*, 702 So. 2d 388, decided Oct. 23, 1997 the Mississippi Supreme Court amended the rule by abandoning the perjurer's incompetency rule, striking that subsection from the rule. A witness previously convicted of perjury or subornation of perjury is now competent as a witness and the fact of such a prior conviction will be available for impeachment of the witness under Rule 609(a)(2). Former subsection (c), now subsection (b) reflects the substance of a prior amendment to Rule 601 made by the Mississippi Supreme Court in *Hudspeth v. State Highway Commission of Mississippi*, 534 So.2d 210 (Miss. 1988). The Hudspeth amendment excepted from competency court appointed experts in eminent domain proceedings. The Hudspeth amendment, which was made retroactive to January 1, 1986,

specifically referred to the provisions of then existing M.C.A. § 11-27-89. Subsection (b) reflects the substance of the Hudspeth amendment but deletes any statutory reference.

[Amended January 31, 1990; March 20, 1995; amended effective July 1, 1998.]

RULE 602. LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Comment

Rule 602 states existing practice. A person must have personal knowledge of the matter as opposed to a mere opinion, in order to testify. *See Dennis v. Prisock,* 221 So.2d 706 (Miss. 1969); *Perkins v. State*, 290 So.2d 697 (Miss. 1974). Normally the witness himself will supply the necessary foundation showing that he has personal knowledge. Rule 602 does not prevent, however, the witness from testifying about hearsay statements. He need only show that he has personal knowledge regarding the making of the statements. He cannot testify about the subject matter contained in the hearsay statement. When he is testifying with regard to hearsay statements, Rules 801 and 805 are applicable. *See* FRE 602, Advisory Committee's Notes.

RULE 603. OATH OR AFFIRMATION

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

Advisory Committee Historical Note

Effective March 20, 1995, the Comment to Rule 603 was amended to delete the reference to a repealed statute. 648-651 So.2d 651 So.2d XXVI (West Miss. Cases1995).

Comment

Rule 603 is consistent with M.R.C.P. 43(d) which provides that an affirmation may be made in lieu of an oath. The policy behind allowing an affirmation in lieu of an oath is to refrain from offending religious persons who oppose oath-taking, atheists, and children who are too young to comprehend the meaning of an oath, among others. The affirmer as well as the oath-taker are equally subject to perjury charges under M.C.A. § 97-9-59.

[Amended March 20, 1995.]

RULE 604. INTERPRETERS

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

Advisory Committee Historical Note

Effective March 20, 1995, the Comment to Rule 604 was amended to delete the reference to repealed statutes. 648-651 So.2d 651 So.2d XXVI (West Miss.Cas.1995).

Comment

This rule should be read in conjunction with M.R.C.P. 43(f), M.C.A. § 99-17-7, and M.C.A. §§ 13-1-301 through 315.

[Amended March 20, 1995.].

RULE 605. COMPETENCY OF JUDGE AS WITNESS

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

RULE 606. COMPETENCY OF JUROR AS WITNESS

(a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

[Amended effective July 1, 2009]

Comment

Rule 606(a) disqualifies a juror from taking the witness stand during the trial of the case in which the juror is sitting. Of course, calling a juror as a witness will be rare; voir dire will generally expose a juror's knowledge of facts relevant to a case and result in disqualification of the juror for cause.

Rule 606(b) is designed to protect all "components of [a jury's] deliberations, including arguments, statements, discussions, mental and emotional reactions, votes and any other feature of the process." *See* FRE 606, Advisory Committee Notes. Thus testimony or affidavits of jurors is incompetent to show a compromise verdict, a quotient verdict, misinterpretation of instructions, and the like. See, e.g., *Hayes v. Entergy Mississippi, Inc.*, 871 So. 2d 743 (Miss. 2004) (pressure to reach a verdict); *Busick v. St. John*, 856 So. 2d 304 (Miss. 2003) (misinterpretation of instructions); *APAC-Mississippi, Inc. v. Goodman*, 803 So. 2d 1177 (Miss. 2002) (quotient verdict); *Curtis v. Bellwood Farms, Inc.*, 805 So. 2d 541 (Miss. Ct. App. 2000) (improper consideration of attorney's statements despite court's cautionary instruction); *Gavin v. State*, 767 So. 2d 1072 (Miss. Ct. App. 2000) (confusion regarding instructions); *Galloway v. State*, 735 So. 2d 1117 (Miss. Ct. App. 1999) (improper consideration of defendant's prior conviction). This broad rule of exclusion ensures jurors "freedom of deliberation, stability and finality of verdicts, and protection of jurors against

annoyance and embarrassment." *See* FRE 606, Advisory Committee Notes.

Rule 606(b) does not purport to set forth the substantive grounds for setting aside verdicts because of an irregularity. Even when grounds are alleged to exist, there is a "general reluctance after verdict to haul in and probe jurors for potential instances of bias, misconduct or extraneous influences." *Gladney v. Clarksdale Beverage Co., Inc.*, 625 So. 2d 407, 418 (Miss. 1993) (discussing substantive grounds for setting aside a verdict). At the least, a party needs to show "a specific, non-speculative impropriety has occurred," and the trial court must supervise any post-trial investigation to "ensure that jurors are protected from harassment and to guard against inquiry into subjects beyond which a juror is competent to testify." *Id.* at 419. When jurors are permitted to testify about objective facts not of record and about outside influences, they may not be questioned about the effect upon them of what was improperly brought to their attention. *Id.*

In narrowly prescribed circumstances, Mississippi permits the correction of clerical errors in the verdict, notwithstanding Rule 606(b). *See Martin v. State*, 732 So. 2d 847, 851-855 (Miss. 1998) (Verdict incorrectly stated the defendant was guilty of possession of morphine when in fact the jury unanimously found the defendant not guilty. Such an allegation of clerical error did "not challenge the "validity" of the verdict or the deliberation or mental process of the jurors.") Of course, the possibility of clerical errors in the verdict form will be reduced substantially by polling the jury. Errors that come to light after polling the jury "may be corrected on the spot, or the jury may be sent out to continue deliberations, or, if necessary, a new trial may be ordered." C. Mueller & L. Kirkpatrick, *Evidence Under the Rules* at 671 (2d ed. 1999) (citing *Sincox v. United States*, 571 F.2d 876, 878-79 (5th Cir. 1978)).

[Comment adopted effective July 1, 2009]

RULE 607. WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling him.

Comment

Rule 607 is a repudiation of the old voucher rule. With regard to civil cases the voucher rule was previously eliminated by former M.R.C.P. 43(b)(4) which became effective January 1, 1982. Former M.R.C.P. 43(b)(4) has been abrogated by Rule 607. Rule 607 now

repudiates the voucher rule in both civil and criminal cases.

RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

(a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to character for truthfulness.

[Amended effective July 1, 2009.]

Comment

Rule 608 is concerned with character evidence of witnesses. Rule 404(a) prohibits the use of character evidence to prove conformity of conduct, but with some exceptions. Rule 608 addresses those exceptions. Thus, it is necessary to read both rules together.

Subsection (a) permits the introduction of character evidence of a witness only after the witness's character for veracity has been attacked. A party may not bolster the character of the party's own witness; the party can only react in response to a charge of

untruthfulness. Moreover, only the witness's character for truthfulness or its opposite can be attacked. Other character traits are irrelevant for impeachment purposes. Evidence shall be produced in the form of an opinion or reputation.

Subsection (b) flatly prohibits impeaching a witness's character for truthfulness via *extrinsic proof* of specific acts of the witness's conduct, except criminal convictions pursuant to ; Rule 609. In contrast, specific instances of conduct of the witness may, in the discretion of the court, be inquired into on *cross-examination* of that witness (or on cross-examination of another who testifies concerning that witness's character for truthfulness) *if* probative of truthfulness or untruthfulness. *See Brent v. State,* 632 So.2d 936, 944 (Miss. 1994) ("If the past conduct did not involve lying, deceit, or dishonesty in some manner, it cannot be inquired into on cross-examination.")

This absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness's character for truthfulness. The admissibility of extrinsic evidence offered for other grounds of impeachment, such as contradiction, prior inconsistent statement, bias, and mental or sensory capacity, is governed by Rules 402, 403, and 616.

The extrinsic evidence prohibition of Rule 608(b)bars the use of any kind of evidence, including documents or the testimony of other witnesses, except a direct admission by the witness being cross-examined. *See Brent* at 945 ("a party cross-examining a witness about past instances of conduct is bound by the witness's answer [and] is not permitted to offer evidence in rebuttal to contradict it.")

Of course, counsel must have a good faith basis before beginning to inquire on cross-examination about specific instances of past conduct, and may not merely seek a "fishing license." *Brent,* 632 So.2d at 645.

The last sentence of Rule 608 seeks to guarantee that a witness does not waive the privilege against self-incrimination when questioned about matters relating to credibility.

[Comment amended effective July 1, 2009.]

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that (A) a nonparty witness has been convicted of a crime shall be admitted subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and (B) a party has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the party; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by the specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, Expungement or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, expungement, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

[Amended effective May 2, 2002; July 1, 2009.]

Advisory Committee Historical Note

Effective May 2, 2002, Rule 609(a) and its Comment were amended to provide that scrutiny for admitting convictions to impeach non-party witnesses differs from that of party witnesses. 813-815 So.2d XXIII-XXVII (West Miss.Cas.2002).

Effective March 1, 1989, the Comment to Rule 609(a) was amended to include reference to *Peterson v. State*, 518 So.2d 632 (Miss.1987). 536-538 So.2d XXXII (West Miss.Cas.1989).

Comment

Under Rule 609(a) crimes are divided into two categories for purposes of impeachment. 609(a)(1) deals with felony convictions and under the original version treated convictions of all witnesses the same. The second category, 609(a)(2), originally addressed crimes involving dishonesty or false statement, whether felonies or misdemeanors.

Rule 609(a)(1) was amended in 2002 to incorporate the rationale of decisions by the Mississippi Supreme Court which recognized the difference in the highly prejudicial effect of showing the convictions when the witness is the accused and the little prejudicial effect from such impeachment of other witnesses. It was reasoned that when the impeachment by convictions is of a witness other than the accused in a criminal case there is little or no unfair prejudice which can be caused to a party. Thus, the probative value on the credibility of the witness will almost always outweigh any prejudice. In *White v. State*, 785 So.2d 1059 (Miss.2001) it was held that the accused had the right, bolstered by his right of confrontation, to impeach a state's witness with his felony drug conviction. In *Moore v. State*, 787 So.2d 1282 (Miss.2001) the court held that the state was properly permitted to impeach a defense witness with his five prior convictions, noting that there was no prejudice against the accused.

The amendments here refer to parties instead of the accused to clearly apply to civil cases, as did the original rule. Under this amended rule, convictions offered under 609(a)(1) to impeach a party must be analyzed under the guidelines set forth in *Peterson v. State*, 518 So.2d 632 (Miss.1987) to determine if the probative value is great enough to overcome the presumed prejudicial effect to that party, and findings should be made on the record by the judge. Convictions offered to impeach any other witness are admissible unless the court is

persuaded by the opponent that the probative value is substantially outweighed by negative factors included in Rule 403. A record of the findings on the issue is not required in that case. See *Moore*, above.

Convictions from any state or federal jurisdiction may be considered for admission under the rule.

The phrase "dishonesty or false statement" in 609(a)(2) means crimes such as perjury or subornation of perjury, false statement, fraud, forgery, embezzlement, false pretense or other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the witness' propensity to testify truthfully. Such convictions are peculiarly probative of credibility and are always to be admitted, not subject to the discretionary balancing by the judge.

Rule 609(a)(2) requires that the proponent have ready proof that the crime was in the nature of *crimen falsi*. Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment -- as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly -- a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. *Cf. Taylor v. United States, 110 S.Ct. 2143 (1990)* (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face); *Shepard v. United States*, 125 S.Ct. 1254 (2005) (the inquiry to determine whether a guilty plea to a crime defined by a nongeneric statute necessarily admitted elements of the generic offense was limited to the charging document's terms, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or a comparable judicial record). But the rule does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi*.

The reference in former 609(a) to proving a conviction during cross-examination is eliminated because the conviction may have to be proved in rebuttal if the witness refuses to admit the prior conviction on cross-examination.

The first sentence of 609(a) uses the term "character for truthfulness" instead of the prior term "credibility," because the limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See,*

e.g., *United States v. Lopez, 979 F.2d 1024 (5th Cir. 1992)* (Rule 609 was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subdivision (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

Subsection (b) imposes a time limitation on prior convictions. If the conviction occurred more than ten years earlier, it may not be used as impeachment evidence. The rationale underlying subsection (b) is based on fairness. A person's past should not be able to haunt the person for life. The judge may grant an exception in instances where the probativeness of the conviction substantially outweighs the prejudice. But, before the judge makes such a decision, the proponent must give the adversary sufficient notice so that the adversary may challenge the decision.

Prior to the rules Mississippi had no time limitation regarding prior convictions. The courts held only that the prior conviction should not be too remote in time from the case at bar. That principle obviously left a great deal of discretion with the trial judge in determining remoteness. Thus, the appellate court often upheld the use of prior convictions for impeachment which were far in excess of the ten-year limitation of Rule 609(b).

Subsection (c) expresses the public policy that a person who has been rehabilitated or whose conviction has been nullified based on a later finding of his innocence should not be tainted by this conviction. Subsection (c) does not apply to pardons which simply restore a person's civil rights. Rather, it is implicitly limited to cases in which rehabilitation has occurred or in which it can be shown that the person was innocent.

Subsection (d) prohibits impeachment based on juvenile adjudications. Reasons for this rule include the wish to free an adult from bearing the burden of a youthful mistake, the informality of youth court proceedings, and the confidential nature of those proceedings. *See* FRE 609, Advisory Committee's Notes.

In pre-rule Mississippi practice, the use of juvenile adjudications for impeachment purposes has been governed by M.C.A. § 43-21-561 which provides that no adjudication against a child shall be deemed a criminal conviction. Indeed, the juvenile offender is permitted by statute to deny the fact of the prior adjudication. However, the statute permits cross-examination by either the state or the defendant in a criminal action or the respondent in a juvenile adjudication proceeding regarding prior juvenile offenses for the limited purpose of showing bias and interest. In short, the evidence could be used in these limited circumstances but not to attack the general credibility of the witness.

Under Rule 609(d) the court has the discretion to allow impeachment of a witness,

other than a criminal defendant, by a prior juvenile adjudication if the judge determines that it is necessary. The court's discretion extends only to witnesses other than the accused in a criminal case.

Subsection (e) reflects the presumption that exists in favor of a trial court's decision. Until overturned, that decision is deemed to be the correct decision. Once the prior conviction has been introduced, the adversary can present evidence that an appeal of that conviction is pending. In theory, this gives a sense of balance to the use of the prior conviction. However, in practice, evidence of a pending appeal has insufficient weight to balance the use of the prior conviction.

[Comment amended effective March 1, 1989; May 2, 2002; July 1, 2009.]

RULE 610. RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

Comment

This rule prohibits impeaching a witness by questioning him concerning his religious beliefs and opinions. It does not prohibit questioning him as to those beliefs and opinions when testing his bias or interest.

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. Cross-examination shall not be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.

(c) Leading Questions. Leading questions should not be used on the direct

examination of a witness except as may be necessary to develop his testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Comment

Subsection (a) is a verbatim restatement of M.R.C.P. 43(b)(1). Subsection (a) gives the court the discretion to control the order of interrogation. The three principles underlying an orderly presentation of evidence are effectiveness in determining the issues, avoidance of needless waste of time, and protection of the witness from harassment and embarrassment. Subsection (a) is designed in part to give the judge the discretion to determine whether presentation of the evidence must be in question-and-answer form or whether it may be in narrative form. *See* FRE 611, Advisory Committee's Notes.

Subsection (b) reflects prior Mississippi practice. Subsection (b) permits a wide-open cross-examination. In this respect Mississippi follows the English rule. See Weinstein's Evidence ¶¶ 611[02-03]. Under this wide-open cross-examination any matter may be probed that is relevant. Nonetheless, under Rule 611(a) the judge may still limit cross-examination to serve one of the purposes therein stated.

Rule 611(c) discusses the use of leading questions. It reflects common law practice. Leading questions as a general rule should not be used on direct examination since they suggest the answers the attorney wants from his own witness. This gives an unfair advantage to the party who is presenting his case. However, the judge has some discretion in allowing leading questions. Thus, leading questions are frequently used in developing preliminary matters. *See Seals v. St. Regis Paper Company*, 236 So.2d 388 (Miss. 1970); *Thomas v. State*, 217 So.2d 287 (Miss. 1969). When determining whether a child is competent to testify, a judge might also allow leading questions. *See Allen v. State*, 384 So.2d 605 (Miss. 1980). Other instances may occur with the witness whose recollection is exhausted and with the witness who has communication difficulties.

The last sentence gives a party the right of cross-examination when questioning witnesses who are hostile or when questioning an adverse party or someone identified with an adverse party. The issue of who may be considered as "identified with an adverse party" was confronted in *Harris v. Buxton T.V., Inc.*, 460 So.2d 828 (Miss. 1984).

The Advisory Committee is cognizant of the *Harris* decision but considers the interpretation and application of the phrase "identified with the adverse party" to be broader than that expressed in *Harris*.

Assuming the witness is deemed sufficiently "identified with an adverse party," the use of leading questions falls within the area of control by the judge over "the mode and order of interrogating witnesses. . . ." Accordingly, the last sentence of 611(c) is phrased in words of discretion rather than command.

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as, for example, the "cross-examination" of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

RULE 612. REFRESHING THE MEMORY OF A WITNESS

If a witness uses a writing, recording or object to refresh his memory for the purpose of testifying, either (1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing, recording or object produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce into evidence those portions which relate to the testimony of the witness. If it is claimed that the writing, recording or object contains matters not related to the subject matter of the testimony, the court shall examine the writing, recording or object in camera, excise any portions not related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing, recording or object is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.
[Amended effective August 12, 1992.]

Advisory Committee Historical Note.

Effective August 12, 1992, Rule 612 was amended to allow recordings and objects to be used to refresh a witness's memory. 603-605 So. 2d XXIV (West Miss. Cas. 1993).

Comment

Rule 612, while reflecting existing federal practice, deviates in some respects from pre-rule Mississippi practice. The purpose of Rule 612 is to stimulate memory in order to ascertain credible evidence.

If the witness uses a writing, recording or object (e.g., a photograph) while testifying, the adversary has the right to see such writing, recording or object, to cross-examine on the basis of these items, and to have the relevant portions introduced into evidence. If, on the other hand, the witness uses such items to refresh his memory before testifying, then it is within the trial court's discretion to allow the adversary to see them.

Additionally, the rule provides for an offer of proof when the trial court withholds certain portions of a writing, recording or object from the cross-examiner's use. The rule also provides sanctions for the occasions when such items are not produced pursuant to a court order.

The pre-rule Mississippi practice of using a writing to refresh a witness's memory has often been confused with the past recollection recorded exception to the hearsay rule. Prior to the rules, a party who simply wanted to refresh a witness's memory often felt compelled to satisfy the foundation requirements of the hearsay exception. Rule 612 eliminates this state of confusion and permits any writing, recording or object to be used, regardless of whether it is in compliance with the foundation requirements of the hearsay exception. [Amended effective August 12, 1992.]

RULE 613. PRIOR STATEMENTS OF WITNESSES

(a) Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Comment

Subsection (a) abolishes the requirement that a cross-examiner, prior to questioning the witness about a prior statement in writing, must first show this writing to the witness. This requirement was developed in *The Queen's Case*, 2 Br. & B. 284, 129 Eng.Rep. 976 (1820). Although it was abolished in Britain and later in our federal courts, the rule lingered on in Mississippi.

This rule explicitly applies to both written and oral statements.

The provision allowing disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.

The rule does not defeat the application of Rule 1002 relating to the production of the original when the contents of a writing are sought to be proved. Nor does it defeat the application of M.R.C.P. 26(b)(3), entitling a person on request to a copy of his own statement, though the operation of the latter may be suspended temporarily.

Subsection (b) preserves the foundation requirement in The Queen's Case with some modifications when impeachment is by extrinsic evidence. The traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine the statement, with no specification of any particular time or sequence. Under this procedure, several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement.

In order to allow for such eventualities as the witness becoming unavailable by the time the statement is discovered, a measure of discretion is conferred upon the judge.

The rule does not apply to impeachment by evidence of prior inconsistent conduct by virtue of the principles of *expression unius*. The use of inconsistent statements to impeach a hearsay declaration is treated in Rule 806.

RULE 614. CALLING AND INTERROGATION OF WITNESSES BY COURT

(a) Calling by Court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by Court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Comment

Rule 614 is, in general, similar to Mississippi practice.

Subsection (a) reflects the recognized authority of the trial judge to call witnesses. When the court calls its own witness, any party has the right to cross-examine that witness.

Subsection (b) codifies the traditional authority, recognized in Mississippi and elsewhere, of the judge to interrogate the witness directly. The judge abuses this authority, however, when he abandons his judicial detachment and assumes an advocacy position. *See Jones v. State*, 223 Miss. 812, 79 So.2d 273 (1955), appeal dismissed, *cert. denied*, 350 U.S. 869 [76 S.Ct. 116, 100 L.Ed. 770] (1955), rehearing denied, 350 U.S. 919 [76 S.Ct. 192, 100 L.Ed. 805 (1955); Rule 5.08, Uniform Criminal Rules of Circuit Court Practice. The appellate court can in such cases reverse for abuse of discretion. *See Breland v. State*, 180 Miss. 830, 178 So. 817 (1938).

The case of *Griffin v. Tate*, 171 Miss. 70, 156 So. 652 (1934), established guidelines for judicial interrogation which may be helpful in setting the parameters of Subsection (b). Griffin mentions by way of illustration some instances in which judicial interrogation would be appropriate: when a nervous witness needs to be calmed or is reluctant to testify or is confused as well as when the witness has important information which has not been elicited from him.

Subsection (c) is an attempt to relieve counsel from the embarrassing position of objecting in the jury's presence to the judge's interrogation. It allows, moreover, sufficient time for counsel to make the objections in time for corrective measures.

RULE 615. EXCLUSION OF WITNESSES

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Advisory Committee Historical Note

Effective January 31, 1990, the Comment was amended to include reference to a case. 553-560 So.2d XXVII (West Miss.Cas. 1990).

Comment

The excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing falsification, inaccuracy, and collusion. The rule of sequestration, or simply "the rule" as it has been known in Mississippi, has a time-honored tradition in state trial practice. Prior to these Rules, *Reagan Equipment Co. v. Vaughn Gin Co.*, 425 So.2d 1045 (Miss. 1983), provided guidance for implementation of "the rule."

Under Rule 615 exceptions are made for several categories of witnesses. First, parties are excepted because their exclusion would raise serious problems of confrontation and due process. Secondly, as the equivalent of the right of a natural-person party to be present, a party that is not a natural person is entitled to have a representative present. The third category includes a person such as an agent who handled the transaction being litigated, an expert needed to advise counsel during the litigation, or an expert witness who must hear the testimony of other witnesses in order to form an opinion which he will later state testimonially. *Collins v. State*, 361 So.2d 333 (Miss. 1978), provides guidance for permitting an expert to remain in the courtroom. In each instance the person's presence must be "shown by a party to be essential to the presentation of his case."

The sequestration may arise from a motion of a party or from the court on its own motion. This differs from pre-rule Mississippi practice in which a judge would not invoke the rule unless requested.

This rule differs from former Mississippi practice whereunder a party could be excluded during his case-in-chief only after he had the choice of testifying before his other witnesses. Under this rule, a party may remain in the courtroom at all times.

This rule does not discuss sanctions for violation of the sequestration order. Under existing Mississippi law the court has the discretion to exclude the offending witness from testifying. *See Johnson v. State*, 346 So.2d 927 (Miss. 1977). The trial judge should not permit a witness who has violated the rule to testify unless he has first determined that the adversary would not be prejudiced by the violation of the rule. Other available remedies might be to strike the testimony of a witness who violated the rule, cite the witness for

contempt, or allow a "full-bore" cross-examination. *See Douglas v. State*, 525 So.2d 1312 (Miss. 1988).

[Amended January 31, 1990.]

RULE 616. BIAS OF WITNESS

For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.

[Adopted effective March 1, 1989.]

Advisory Committee Historical Note.

Effective March 1, 1989, the Court adopted Rule 616. 536-538 So.2d XXXII (West Miss.Cas. 1989).

Comment

The common law permitted inquiry into a witness's bias, prejudice, or interest in a case for credibility purposes. *See* Ellis & Williams, Mississippi Evidence, § 4-4. The Mississippi Rules of Evidence did not originally include a rule permitting examination of a witness's bias, prejudice, or interest. Despite a similar omission in the Federal Rules of Evidence, the United States Supreme Court reaffirmed the common law use of impeachment by bias, prejudice, or interest in *United States v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). MRE 616 codifies this longstanding principle in Mississippi as well as the holding in *United States v. Abel*. MRE 616 tracks the language of Uniform Rule of Evidence 616.

RULE 617. USE OF CLOSED CIRCUIT TELEVISION TO SHOW CHILD'S TESTIMONY

(a) Upon motion and hearing in camera, the trial court may order that the testimony of a child under the age of sixteen (16) years, that an unlawful sexual act, contact, intrusion, penetration or other sexual offense was committed upon him or her be taken outside of the courtroom and shown in the courtroom by means of closed-circuit television upon a finding that there is a substantial likelihood that the child will suffer traumatic emotional or mental

distress if compelled to testify in open court and, in the case of a criminal prosecution, if compelled to testify in the presence of the accused.

(b) The motion may be filed by the child, his attorney, parent, legal guardian or guardian ad litem, the prosecuting attorney, or any party to the case. In addition, the court may act upon its own motion.

(c) Upon stipulation of the parties, the court may appoint a person, who is qualified as an expert in the field of child sexual abuse and who has dealt with the child in a therapeutic setting concerning the offense or act, to aid in formulating methods of questioning the child and to assist the court in interpreting the answers of the child.

(d) Closed circuit television testimony may be taken by any method not inconsistent with the Confrontation Clauses of the Constitution of the United States and of the State of Mississippi, the Mississippi Rules of Civil Procedure, the Mississippi Uniform Criminal Rules of Circuit Court Practice, and these rules. In the case of a criminal prosecution, after a determination that the defendant's presence would cause a substantial likelihood of serious traumatic emotional or mental distress to the child, the trial court may exclude the defendant from the room where the testimony is taken. In any such case in which the defendant is so excluded, arrangements must be made for the defense attorney to be in continual contact with the defendant by any appropriate private electronic or telephonic method throughout the questioning. The defendant, the court and the jury must be able to observe the demeanor of the child witness at all times during the questioning.

(e) The court shall make specific findings of fact, on the record, as to the basis for its rulings under this rule.

(f) All parties must be represented by counsel at any taking of any testimony under this rule.

(g) This rule does not preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.
[Adopted effective March 27, 1991.]

Advisory Committee Historical Note.

Effective March 27, 1991, the Court adopted Rule 617. 574-576 So. 2d XXVIII (West Miss. Cas. 1991).

Comment

This rule provides an exceptional procedure for the taking of testimony from children said to have been the victims of sexual abuse. If this rule is applied in a criminal case, the rights of the defendant under the Confrontation Clauses of Federal and State Constitutions must be respected. *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990); *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).

[Comment adopted effective March 27, 1991; amended effective July 1, 2009 to update citations.]

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, ~~his~~ the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness,(b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

[Amended March 2, 1987, effective October 1, 1987; April 17, 2000, effective December 1, 2000. Amended effective May 29, 2003 to prohibit opinion testimony under Rule 701 based on scientific, technical, or other specialized knowledge within the scope of Rule 702.]

Comment

The traditional rule regarding lay opinions has been, with some exceptions, to exclude them from evidence. Rule 701 is a departure from the traditional rule. It favors the admission of lay opinions when two considerations are met. The first consideration is the familiar requirement of first-hand knowledge or observation. The second consideration is that the witness's opinion must be helpful in resolving the issues. Rule 701, thus, provides flexibility when a witness has difficulty in expressing the witness's thoughts in language which does not reflect an opinion. Rule 701 is based on the recognition that there is often too thin a line between fact and opinion to determine which is which.

The 2003 amendment of Rule 701 makes it clear that the provision for lay opinion is not an avenue for admission of testimony based on scientific, technical or specialized knowledge which must be admitted only under the strictures of Rule 702.

[Comment amended effective May 29, 2003.]

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[Amended effective May 29, 2003 to clarify the gatekeeping responsibilities of the court in evaluating the admissibility of expert testimony.]

Comment

The use of the hypothetical question has been justly criticized. Rule 702 permits an expert to testify by giving an opinion or any other form of testimony, such as an exposition. Rule 702 seeks to encourage the use of expert testimony in non-opinion form when counsel believes the trier can draw the requisite inference. The rule, however, does not abolish the use of opinions. As the Federal Rules Advisory Committee's Note pointed out, it will still be possible for an expert to take the next step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts.

As has long been the practice in Mississippi, Rule 702 recognizes that one may qualify as an expert in many fields in addition to science or medicine, such as real estate, cotton brokering, auto mechanics or plumbing. *Boggs v. Eaton*, 379 So.2d 520 (1980); *Early-Gary, Inc. v. Walters*, 294 So.2d 181 (Miss. 1974); *Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 317 So.2d 47 (Miss. 1975). Rule 702 is the standard for the admission of expert testimony from such other fields as well as for scientific testimony. See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

By the 2003 amendment of Rule 702, the Supreme Court clearly recognizes the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant

and reliable. This follows the 2000 adoption of a like amendment to Fed. R. Evid., 702 adopted in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993). It is important to note that Rule 702 does not relax the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge, and that the factors mentioned in *Daubert* do not constitute an exclusive list of those to be considered in making the determination; *Daubert's* "list of factors was meant to be helpful, not definitive." *Kumho,* 526 U.S. at 151. See also *Pepitone v. Biomatrix, Inc.* 288 F. 3d 239 (5th Cir. 2002).

[Comment amended May 29, 2003.]

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Comment

There are three possible sources which may produce an expert's facts or data. Practice in Mississippi already recognizes two of them: (1) where the expert bases his opinion on personal observation, and (2) where he bases it either on a hypothetical question presented to him at trial or on the trial testimony of others which the expert has heard while sitting in the courtroom. *See Collins v. State*, 361 So.2d 333 (Miss. 1978). The new practice under Rule 703 brings a third source: the presentation of data to the expert outside of court and other than by his personal observation. The Advisory Committee's Note to FRE 703 presents a persuasive rationale for the use of the third source. A physician, for example, bases his medical diagnosis of his patient on many sources. Most of his sources are admissible in evidence but only with the expenditure of substantial time in producing and examining various authenticating witnesses. Since these sources provide the doctor with information that he utilizes in making life-and-death decisions, his validation of them ought to be sufficient for trial, especially since he can be cross-examined.

RULE 704. OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Comment

Rule 704 abolishes the "ultimate issue rule" which existed in pre-rule Mississippi practice. The ultimate issue rule was often unnecessarily restrictive and generally difficult to apply. More often than not the invocation of the rule served to deprive the trier of fact of useful information. Rule 704 clarifies much of the confusion over the ultimate issue rule. An opinion is no longer objectionable solely on grounds that it "invades the province of the jury."

The abolition of the ultimate issue rule does not result in the admission of all opinions. It is an absolute requirement under Rules 701 and 702 that opinions must be helpful to a determination of the case before they are admissible. Furthermore, under Rule 403 evidence is excluded which wastes time. A question may not be asked which is based on adequately explored legal criteria since the answer would not be helpful. As the FRE Advisory Committee's Note to FRE 705 indicates, the question in a will contest, "Did the testator have the capacity to make a will" is still not permitted, whereas the question, "Did the testator have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution" would be. The former question is not helpful; the latter is.

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inferences and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Comment

Rule 705 is an attempt to eliminate the use of the hypothetical question or, at the least, reduce its use. The almost universal criticism of the hypothetical question is that it is unduly complex and time-consuming. While dispensing with the requirement of preliminary disclosure at the trial of underlying facts or data, Rule 705 nonetheless offers two protections. The court may, in its discretion, require disclosure. Regardless of whether it does, the expert may still be required to state the underlying facts on cross-examination.

RULE 706. COURT APPOINTED EXPERTS

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have the opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the Fifth Amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of Appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' Experts of Own Selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(e) Certain Eminent Domain Proceedings. The provisions of Rule 706(a), (b), and (c) are inapplicable to appraisers who are appointed by the court as required by state law for purposes of claims for immediate possession in eminent domain cases.

[Amended November 16, 1988, effective retroactive to January 1, 1986; amended January 31, 1990]

Advisory Committee Historical Note.

Effective March 20, 1995, the Comment to Rule 706 was amended to note the repeal of a statute. 648-651 So.2d 651 So.2d XXVI (West Miss.Cas.1995).

Effective January 31, 1990, Rule 706 and its comment were amended to reflect the decision in *Hudspeth v. State Highway Com'n of Mississippi*, 534 So.2d 210 (Miss.1988)

amending Rule 706, November 16, 1988, effective retroactive to January 1, 1986. 553-556 So.2d XXVII (West Miss.Cas.1990).

Comment

The essence of Rule 706 is contained in subsection (a). Subsection (a) provides specifically for the appointment of an expert either on the motion of a party or on the judge's own motion. It also provides for input by the parties into the selection process. Under the rule, the court-appointed expert may be deposed. Any party, including the party calling the expert, may cross-examine him. This rule was amended in 1988 in *Hudspeth v. State Highway Commission of Mississippi*, 534 So.2d 210 (Miss. 1988), to be consistent with the provisions of then existing M.C.A. § 11-27-89 which provided that court appointed experts would not be compelled to testify. The amendment was made retroactive to January 1, 1986, the effective date of the Mississippi Rules of Evidence. Subsequent to the *Hudspeth* amendment, Rule 706(e) was amended to retain the substance of Rule 706(e) as originally approved by the Court in *Hudspeth* while deleting any reference to and dependence upon a specific statutory provision.

[Amended January 31, 1990; March 20, 1995.]

ARTICLE VIII. HEARSAY

A witness's testimony is evaluated on the basis of four factors: perception, memory, narration, and sincerity. In order that the testimony can be properly considered in the light of these factors, the testimony should comply with three conditions. The witness should testify (1) under oath, (2) in the presence of the trier of fact, and (3) be subjected to cross-examination. Past experience as well as common sense indicate that some testimony which does not conform to these three conditions may be more valuable than testimony that does. The four factors may, in some instances, be present in the absence of compliance with the three aforementioned conditions. The solution that the common law developed over a period of time was a general rule against hearsay which permitted exceptions which furnished guarantees of trustworthiness and reliability.

The hearsay provisions of the uniform rules retain the common law scheme. The traditional common law hearsay exceptions have been retained in Rules 803 and 804. Rule 803 concerns itself with situations where availability of the declarant is immaterial. Rule 804 pertains to exceptions which are usable only where the declarant is unavailable. The concluding provisions of both Rule 803 and 804 (Rule 803(24) and Rule 804(b)(5)

respectively) allow for the use of hearsay statements which do not fall within the recognized exceptions, when the guarantees of trustworthiness and necessity are present. These two provisions are a recognition that the law is not stagnant; they are designed to encourage the development of this area of the law.

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if:

(1) *Prior Statement by Witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) *Admission by Party-Opponent*. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of

the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

[Amended effective July 1, 2009.]

Advisory Committee Historical Note

Effective May 27, 2004, the Comment to Rule 801 was amended to include the paragraph concerning subsection (d)(1)(C).

Effective March 1, 1989, the Comment was amended to delete the statement about Rule 801(d)(1)(C) and to include an additional comment about 801(d)(2). 536-538 So.2d XXXII (West MissCas.1989).

Comment

Subsection (a) defines with clarity the concept of a statement. The significant point is that nothing is an assertion unless intended to be one. This becomes particularly important in situations which deal with nonverbal conduct. Some nonverbal conduct is clearly tantamount to a verbal assertion, e.g., pointing to someone to identify that person. The definition of statement excludes nonverbal conduct which is not assertive. Thus, the definition of hearsay in Rule 801(c) concerns itself with conduct that is assertive.

When evidence of conduct is offered on the basis that the conduct was not a statement and, therefore, not hearsay, the trial judge must make a preliminary determination to ascertain whether an assertion was intended by the conduct. The burden is upon the party claiming that the intention existed.

Subsection (c) codifies and simultaneously clarifies the common law definition of hearsay. If the significance of a statement is simply that it was made and there is no issue about the truth of the matter asserted, then the statement is not hearsay.

Under this definition of hearsay an out-of-court statement made and repeated by a witness testifying at trial is hearsay. The key is whether the statement is made while testifying or whether it is out-of-court. An out-of court statement otherwise hearsay is technically no less hearsay because it was made in the presence of a party.

Subsection 801(d) has two major parts and both are departures from past Mississippi practice. The purpose of subsection (d) is to exclude statements which literally fall within the definition of hearsay from the hearsay rule.

Subsection 801(d)(1) is concerned with prior statements of the witness. In three specific instances, a witness's prior statement is not hearsay.

Prior inconsistent statements have generally been admissible for impeachment purposes but not admissible as substantive evidence. *Moffett v. State*, 456 So.2d 714, 719 (Miss. 1984). This has been the traditional practice in Mississippi. Under Rule 801(d)(1)(A) the prior inconsistent statements may be admissible as substantive evidence if they were made under oath, e.g., at a deposition or at a judicial proceeding. This covers statements made before a grand jury. There is no requirement that the prior statement be written. If the defendant in a criminal trial has made a prior inconsistent statement, the situation is governed by Rule 801(d)(2).

Rule 801(d)(1)(B) provides that prior consistent statements may be introduced for substantive evidence when offered to rebut a charge against the witness of recent fabrication.

Rule 801(d)(1)(C), which declares that prior statements of identification made by a witness are not hearsay, is not a departure from pre-rule practice. The Court in *Fells v. State*, 345 So.2d 618 (Miss. 1977), departed from the traditional view that such statements were hearsay by adopting what was then the minority view that statements of identification could be admitted as substantive evidence of that identification. The scope of the rule is broader than the *Fells* holding in that: (1) there is no need for a prior attempt to impeach the witness for the identifying statement to be admissible; (2) the testimony about the prior statement may be from the witness who made it or another person who heard it; (3) the witness who made the statement need not make an in-court identification; and (4) the statement may have been made either in or apart from an investigative procedure. Statements physically describing a person are not statements of identification under this rule. The Confrontation Clause is not violated when a third party testifies about an out-of-court identification made by a witness who is unable to recall or unwilling to testify about that identification, provided the identifying witness testifies at the trial or hearing and is subject to cross-examination. *U.S. v. Owens,* 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed. 2d 951 (1988).

Rule 801(d)(2) deals with admissions made by a party-opponent other than admissions made pursuant to M.R.C.P. 36(b). Admissibility of admissions made pursuant to M.R.C.P. 36(b) is controlled by that rule and is not affected by Rule 801(d)(2). The practice has been in Mississippi to treat an admission as an exception to the hearsay rule. Rule 801(d)(2) achieves the same result of admissibility although it classifies admissions as non-hearsay. There are five classes of statements which fall under the rule:

(A) A party's own statement is the classic example of an admission. If he has a representative capacity and the statement is offered against him in that capacity, no inquiry

whether he was acting in the representative capacity in making the statement is required. It is only necessary that the statement be relevant to representative affairs.

(B) If a party adopts or acquiesces in another person's statement, it will be deemed that the statement is indeed his admission. Knowledge is not a necessary ingredient. *Matthews v. Carpenter*, 231 Miss. 677, 97 So.2d 522 (1957); *Haver v. Hinson*, 385 So.2d 606 (Miss. 1980). This raises the question of when silence is a form of admission. Silence may constitute a tacit admission if a person would have, under the circumstances, protested the statement made in his presence if the statement were untrue. In civil cases, this does not pose a significant problem. In criminal cases, much may depend on the person's constitutional right not to incriminate himself.

(C) The general principle survives that a statement by an agent authorized to speak by a party is tantamount to an admission by a party. The rule covers statements made by the agent to third persons as well as statements made by the agent to the principal. The essence of this is that a party's own records are admissible against him, even where there has been no intent to disclose the information therein to third persons.

(D) The common law required that the agent's statement be uttered as part of his duties, i.e., within the scope of his agency. 801(d)(2)(D) regards this rigid requirement and admits a statement "concerning a matter within the scope of his agency" provided it was uttered during the existence of the employment relationship.

(E) This section codifies the principle that only those statements of co-conspirators will be admissible which were made (1) during the course of the conspiracy and (2) in furtherance of it. This is consistent with the United States Supreme Court's ruling in *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 709 (1949), which deemed inadmissible statements made after the conspiracy's objectives had either succeeded or failed.

Rule 801(d)(2) provides that the court shall consider the contents of the declarant's statement in resolving preliminary questions relating to a declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), and the existence of a conspiracy and the identity of the participants therein under subdivision (E). Generally, foundational facts are governed by Rule 104, not the law of agency. *See Bourjaily v. United States, 107 S.Ct. 2775 (1987).* Under Rule 104(a), these preliminary questions are to be established by a preponderance of the evidence. Of course, in determining preliminary questions, the court may give the contents of the statement as much (or as little) weight as the court in its discretion deems appropriate. Moreover, Rule 801(d)(2) provides that the contents of the statement do not alone suffice to establish the preliminary questions. Rather, the court must in addition consider the circumstances

surrounding the statement, such as the identity of the speaker, the context in which the statement was made, and evidence corroborating the contents of the statement. *See Ponthieux v. State,* 532 So.2d 1239, 1244 (Miss. 1988) ("on appeal … [w]e search the entire record to determine whether the preliminary fact has been established); *Martin v. State,* 609 So.2d 435 (Miss. 1992).

[Comment amended effective March 1, 1989; amended effective May 27, 2004; amended effective July 1, 2009.]

RULE 802. HEARSAY RULE

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

[Amended December 1, 2015.]

Comment

Rule 802 is a statement of existing common law.

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, regardless of to whom the statements are made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances substantially indicating their trust worthiness. For purposes of this rule, the term "medical" refers to emotional and mental health as well as physical health.

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or self-authenticated pursuant to Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of Entry in Records Kept in Accordance With the Provision of Paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the source of information or other circumstances indicate lack of trustworthiness.

(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the state

in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of Vital Statistics. Records or data compilations of vital statistics, in any form, if the report thereof was made to a public officer pursuant to requirements of law.

(10) Absence of Public Record or Entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of Religious Organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, Baptismal, and Similar Certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones or the like.

(14) Records of Documents Affecting an Interest in Property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in Documents Affecting an Interest in Property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. Statements in a document in existence twenty years or more, the authenticity of which is established.

(17) Market Reports, Commercial Publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. Treatises used in direct examination must be disclosed to opposing party without charge pursuant to discovery.

(19) Reputation Concerning Personal or Family History. Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation Concerning Boundaries or General History. Reputation in a community arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community, State or nation in which located.

(21) Reputation as to Character. Reputation of a person's character among his associates or in the community.

(22) Judgment of Previous Conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to Personal, Family or General History, or Boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

(25) Tender Years Exception. A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness: provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

[Amended effective March 27, 1991; July 1, 1997.]

Advisory Committee Historical Note

Effective July 1, 1997, Rule 803(6) was amended to allow predicate evidence for admission of these records to be presented by affidavit in appropriate cases. 689-692 So. 2d LXVIII (West Miss. Cas. 1997.)

Effective March 20, 1995, the Comment to Rules 803(10) and (11) were amended to note the repeal of statutes. 648-651So.2d 651 So.2d XXVI (West Miss.Cas.1995).

Effective March 27, 1991, Rule 803(4) was amended to permit the use of statements made to persons who are not doctors and to define the term "medical." 574-576 So. 2d XXVIII (West Miss. Cas. 1991).

Effective March 27, 1991, the Court adopted Rule 803(25). 574-576 So. 2d XXVIII (West Miss. Cas. 1991).

Comment

Rule 803 provides that the hearsay rule does not exclude certain kinds of statements regardless of whether the declarant is available to testify. The rule explicitly does not state that the exceptions therein are admissible. The rationale for this is to put the parties on notice that, while the hearsay hurdle may not exist, other reasons may be present which justify the exclusion of the evidence. Rule 803 collects the vast majority of the recognized hearsay exceptions.

(1) Present Sense Impression. This exception is a new addition in Mississippi. It is based on the theory that the contemporaneous occurrence of the event and the statement render it unlikely that the declarant made a deliberate or conscious misrepresentation. Precise contemporaneity of the event and the statement may not be possible; a slight lapse may be permissible. Spontaneity is the essential factor. Cited cases which discuss the present sense impression exception are scant. *Houston Oxygen Co. v. Davis*, 139 Tex. 1, 161 S.W.2d 474 (1942), provides, perhaps, the clearest illustration of the exception. The appropriate subject matter of a statement of present sense impression is a description or explanation of an event or condition.

The present sense impression is not the same thing as the *res gestae* exception, although the *res gestae* concept has been used to cover situations where present sense impression would have been appropriate. *Houston Contracting Co. v. Atkinson*, 251 Miss. 220, 168 So.2d 797 (1964). Rule 803 does not provide for an explicit *res gestae* exception. The rules, in effect, abandon the elusive concept of *res gestae*. Rules 803(1), (2), (3), and (4) have elements of the old *res gestae* exception, but they are far more specific and, therefore, they surmount much of the justified criticism regarding *res gestae*. For criticism in Mississippi of the *res gestae* concept, *see McCaskill v. State*, 227 So.2d 847 (Miss. 1969); *Masonite Corp. v. International Woodworkers*, 215 So.2d 691 (Miss. 1968); Barton and Cowart, "The Enigma of Hearsay," 49 Miss.L.J. 31 (1978).

(2) Excited Utterance. In may respects, the excited utterance exception is similar to the former *res gestae* rule. The underlying theory of the excited utterance exception is that circumstances may create such an excited condition that the capacity for reflection is temporarily impeded and that statements uttered in that condition are thus free of conscious fabrication. As in the present sense impression exception, the essential ingredient here is spontaneity. With respect to the time element, the issue is the duration of the excited state. This, depending on the exact circumstances of a case, can vary greatly. The declarant need not be a participant but only an observer of the event which triggered the excitement. An excited utterance need only "relate" to the startling event, and, therefore, the scope of the subject matter of the statement may be fairly broad.

(3) Then Existing Mental, Emotional, or Physical Condition. As the FRE Advisory Committee's Note states, this exception is really a specialized application of Rule 803(1). Its purpose in being specially listed is to enhance its usefulness. The pre-rule *res gestae* exception is even more closely linked with Rule 801(3) than it is with Rule 801(1), (2), and (4). The exclusion in Rule 801(3) of statements which reflect backwards is necessary to prevent the hearsay rule from being totally consumed by the exception. The important case, *Shepard v. United States*, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933), indicates the necessity for the exclusion. On the other hand, statements which indicate intention to do something in the future are admissible to prove that the act intended took place. *See Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed 706 (1892); *Hall v. Hall*, 199 Miss. 478, 24 So.2d 347 (1946).

One exemption from the exclusion is for statements of memory or belief which relate to the execution, revocation, identification, or terms of a declarant's will. There is no particular logical reason for this. Rather, the basis for allowing such statements is founded on necessity and expediency.

(4) Statements for Purposes of Medical Diagnosis or Treatment. Rule 803(4) represents a deviation from previous Mississippi practice in three significant ways. First, Rule 803(4) permits statements of past symptoms as well as present symptoms. Second the rule allows for statements which relate to the source or cause of the medical problem, whereas Mississippi courts formerly disallowed such statements. *See Field v. State*, 57 Miss 474 (1879) and *Miss Cent. R.R. Co. v. Turnage*, 95 Miss. 854, 49 So. 840 (1909) for pre-rule Mississippi law. While statements about cause are permissible, statements concerning fault are still excludible. Third, the statement may be made either to a physician or to diagnostic medical personnel. Mississippi's pre-rule practice distinguished between narrative statements made to a treating physician and those made to an examining physician who was retained for use as an expert witness in the litigation. Statements made to the former were generally admissible, whereas no statements made to the latter were admissible. *See Mississippi Cent. R.R. v. Turnage*, 95 Miss. 854, 49 So. 840 (1909). Rule 803(4) eliminates that distinction and permits statements made both for treating and diagnostic purposes. Under Rule 803(4) the statement need not be made to a physician. This is consistent with traditional Mississippi practice.

The amendment to Rule 803(4) is a recognition that medical diagnosis and treatment may encompass mental and emotional conditions as well as physical conditions. Moreover, the rule, by requiring the judge to find trustworthiness, gives the trial judge greater discretion than the original rule. By permitting the recipient to be non-medical personnel, M.R.E. 803(4) modifies case law interpretations of the former language of this exception and now conforms with prevailing interpretations of F.R.E. 803(4). *See* F.R.E. 803(4), Advisory Committee Notes.

(5) Recorded Recollection. Past recollection recorded has been recognized as a hearsay exception in Mississippi practice. Rule 803(5), however, clarifies much of the past confusion regarding that exception. An essential feature is that this exception may not be employed until there has been a preliminary showing that the witness's memory is exhausted to the extent that he is unable to testify fully and accurately.

There is great judicial discretion in Rule 803(5). As pointed out in the FRE Advisory Committee's Note, the circumstances of a particular case will govern the method of establishing the initial knowledge and the contemporaneity and accuracy of the record in question. It is possible under Rule 803(5) to have several persons involved in the process of observing and recording.

(6) Records of Regularly Conducted Activity. Rule 803(6) is an expansion of the common law business records exception used in Mississippi. The records must be those of a regularly conducted business activity; however, the definition of business is broader than pre-rule practice in Mississippi permitted. It includes records of non-profit institutions and associations. It is important to note that the custodian as well as other qualified witnesses may testify. Thus, it is not necessary to call or to account for all participants who made the record.

However, the source of the material must be an informant with knowledge who is acting in the course of the regularly conducted activity. This is exemplified by the leading case of *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930) which is still the applicable law today under the rule. That case held that a police report which contained information obtained from a bystander was inadmissible; the officer qualified as one acting in the regular course of a business, but the informant did not.

Rule 803(6) specifically includes diagnoses and opinions as proper subjects of admissible entries, as well as the traditionally admissible entries pertaining to acts, events and conditions. The rule calls for the exercise of judicial discretion if there is an indication of a lack of trustworthiness. This permits the court to take into account the motivation of the informant. The phrase "data compilation" includes, but is not limited to, electronic information storage systems.

The reference to self-authentication under Rule 902(11) is to confirm that the predicate for records under this exception may be by affidavit in appropriate cases.

(7) Absence of Entry in Records Kept in Accordance with the Provision of Paragraph (6). A record's failure to mention a matter which would ordinarily be contained in it is admissible to prove the nonexistence of the matter. This is innovative in Mississippi.

Traditional Mississippi courts have admitted evidence of the absence of matter in the record only in the cases of public records.

While it has been unclear whether the absence of information was even hearsay, some courts have treated it as such and have found no exception to apply. Rule 803(7) settles the question of admissibility by clearly making the absence factor an exception.

(8) Public Records and Reports. Public records and reports have been admissible in evidence as an exception to the hearsay rule. Countless statutory provisions in Mississippi formerly provided for the admission of public records. Additionally, there was similar development in the common law. *Ludlow v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 317 So.2d 47 (Miss 1975). Subdivisions (A) and (B) are similar to Mississippi practice. The rule makes no distinction between state and local records. Subdivision (C) adds the new element to the exception as traditionally applied in Mississippi. Subdivision (C) provides that some investigative reports may be treated as hearsay exceptions. To be admissible they must be factual findings made in an investigation which was conducted pursuant to lawful authority. Opinions and conclusions contained in such reports should be excluded.

The experience in other jurisdictions which have adopted an identical rule has been that judges are exercising great caution in admitting these reports. Often they are being excluded if based on hearsay or the opinions of those not involved in the preparation of the report. The rule expressly gives judges the discretion to exclude such reports. Even when admissible, public records under Subdivision (C) may only be used in civil cases and in criminal cases on behalf of a defendant against the state. To permit the state to use such reports against a defendant would be to create confrontation rights problems.

(9) Records of Vital Statistics. This rule is similar to pre-existing Mississippi law. For example, M.C.A. § 41-57-9 formerly provided for the admission of certified copies of birth and death, and M.C.A. § 41-57-47 formerly provided for the admission of certified copies of marriage records.

(10) Absence of Public Record or Entry. Rule 803(10) is also similar to pre-rule Mississippi law. *See, e.g.*, M.C.A. § 13-1-83 (repealed effective July 1, 1991). While the Mississippi statute formerly provided for evidence in the form of a certification, Rule 803(10) gives the possibility of a second form, i.e., oral testimony of the search.

(11) Records of Religious Organizations and **(12) Marriage, Baptismal, and Similar Certificates.** M.C.A. § 13-1-103 (repealed effective July 1, 1991) formerly provided for the admission of marriage certificates. However, Rules 803(11) and (20) go much further. The records of a religious organization are admissible under Rule 803(11) to show statements of

personal and family history. Much of what is admissible might also be admissible under the business records exception.

(13) Family Records. This rule is an extension of existing Mississippi law. The Mississippi court has indicated it will recognize statements of personal or family relationship contained in the family Bible. *See Tisdale v. Jefferson Standard Life Insurance Co.*, 244 Miss. 839, 147 So.2d 122 (1962).

(14) Records and Documents Affecting an Interest in Property. Because of the nature of title documents, they might conceivably be treated as public records. The Mississippi court has long recognized their admissibility. *See*, for instance, *Doe v. McCaleb*, 3 Miss (2 Howard) 756 (1838); *DeLashmet v. McClellen*, 152 Miss. 781, 118 So. 904 (1928).

(15) Statements in Documents Affecting an Interest in Property. Rule 803(15) provides that statements of fact in land documents constitute a hearsay exception. The circumstances under which land documents are made supply the hearsay exception guarantees of reliability and trustworthiness. The rule provides for the exclusion of statements when they fail to comply with the guarantee of trustworthiness. At any rate, many of these documents would be admissible under the conventional ancient document rule.

(16) Statements in Ancient Documents. The ancient documents rule is a traditionally recognized exception in Mississippi. Under this rule the common law period of time is reduced to a minimum of twenty years.

(17) Market Reports, Commercial Publications. This rule, for the most part, codifies existing practice. Mississippi has previously recognized an exception for mortality tables and market reports. *See Tucker v. Donald*, 60 Miss. 460 (1882) and *Yazoo & M.V.R. Co. v. M. Levy & Sons*, 141 Miss 199, 106 So. 525 (1925). The extension to existing practice is in the area of commercial publications. However, the guarantees of trustworthiness for mortality tables and market reports is similar, if not identical, to that for commercial publication. The public, in each case, relies on the publication.

(18) Learned Treatise. Rule 803(18) differs significantly from pre-rule Mississippi practice. It allows statements in learned treatises to be admitted as substantive evidence. This is a departure from Mississippi law which only provided for impeachment use of treatises. *Tucker v. Donald*, 60 Miss. 460 (1882); *Catholic Diocese of Natchez-Jackson v. Jaquith*, 224 So. 2d 216 (Miss. 1969). However, under the rule the statements are only admissible after (1) the witness testifies that the treatise is reliable, (2) another expert so testifies, or (3) the court takes judicial notice. Even then the treatise may not be used substantively unless the witness relied upon it in his testimony on direct examination or the witness was questioned about it on

cross-examination. The rule explicitly states that the statements may not be given to the jury as exhibits; they may only be read to the jury. To submit the treatise to the jury would be to give its written statements more emphasis than the oral testimony presented to the jury.

(19) Reputation Concerning Personal or Family History. This rule is akin to the common law exception relating to family pedigree, although the rule is broader. For instance, a non-familial associate of a person may testify about the personal or family history of that person. The Mississippi court, however, has been moving towards this principle. *See Hathaway v. North*, 190 Miss 697, 1 So.2d 490 (1941). The rule as stated is a recognition that knowledge of a person's history extends throughout his sphere, to family, friends, and community. This reputation evidence may be used for substantive evidence.

(20) Reputation Concerning Boundaries or General History. This rule codifies existing Mississippi law. *See*, for example, *Nixon v. Porter*, 34 Miss. 697 (1858).

(21) Reputation as to Character. This exception is concerned only with the hearsay aspect of reputation evidence. The exception is, in effect, a reiteration in the context of hearsay of Rule 405(a). Limitations upon admissibility based on other grounds are in Rules 404 and 608.

(22) Judgment of Previous Conviction. Rule 803(22) is a significant departure from traditional Mississippi practice. Past Mississippi practice has been to exclude judgments of convictions as substantive evidence of the facts which sustain it. *Gholson v. Smith*, 210 Miss. 28, 48 So.2d 603 (1950). Under 803(22), however, evidence of a judgment of guilty in a felony-grade case is admissible as substantive evidence of any fact essential to uphold the judgment. It is not available where the judgment is based on a plea of *nolo contendere* or on a misdemeanor conviction. The theory for the exclusion of the misdemeanor conviction is based on practicality. Motivation to defend a misdemeanor charge is often minimal.

The exception does not include evidence of the conviction of a third person, offered against the accused in a criminal case, to prove any fact essential to uphold the judgment.

(23) Judgment as to Personal, Family or General History, or Boundaries. This rule is similar to Rule 803(22). It is related to Rules 803(19) and (20) which admit reputation evidence as hearsay exceptions.

(24) Other Exceptions. The rule reflects the realization that the law is not stagnant. As the FRE Advisory Committee's Note indicates, it would be presumptuous to assume that the contemporary legal community has enumerated every single hearsay exception which possible could exist. The exceptions are not a closed system, and Rule 803(24) and its

counterpart Rule 804(b)(5) allow for the future development of the law when the guarantees of reliability and trustworthiness can be found. While these two rules allow for judicial discretion, they do not permit an unfettered discretion which could ultimately devour the hearsay rule. Before admitting statements under this rule, the judge must make a finding that the statements being offered are sufficiently trustworthy and reliable. *See Cummins v. State*, 515 So.2d 869 (Miss. 1987). One of the clearest examples of the circumstances meeting the criteria of Rule 803(24) is found in *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961).

(25) Tender Years Exception. Some factors that the court should examine to determine if there is sufficient indicia of reliability are (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated. Corroborating evidence may not be used as an indicia of reliability. *Smith v. State,* 925 So.2d 825, 837 (Miss. 2006); *Hennington v. State,* 702 So.2d 403, 415 (Miss. 1997). A finding that there is a substantial indicia of reliability should be made on the record.

Mississippi's pre-rule tender years exception did not define "tender years." *See Williams v. State,* 427 So.2d 100 (Miss. 1983). Many jurisdictions limit their analogous exceptions to declarants under the age of fourteen years. However, the exception should not be necessarily limited to a specific chronological age. In appropriate cases, the exception might apply when the declarant is chronologically older than fourteen years, but the declarant has a mental age less than fourteen years.

Corroboration required for admissibility under M.R.E. 803(25)(b)(2) need not be eyewitness testimony or physical evidence, but may include confessions, doctors' reports, inappropriate conduct by the child, and other appropriate expert testimony.

When any of the hearsay exceptions in Rule 803 are applied in a criminal case, the rights of the defendant under the Confrontations Clauses of Federal and State Constitutions must be respected. *Crawford v. Washington* 124 S.Ct. 1354 (2004) (The confrontation clause forbids "admission of testimonial statements of a witness who did not appear at trial unless [the witness is] unavailable to testify, and the defendant had had a prior opportunity for cross-examination."); *Davis v. Washington,* 126 S.Ct. 2266 (2006) (Among other things, prior testimony, depositions, affidavits, and confessions are testimonial, as are other statements to

police if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."). *See also Osborne v. State*, 942 So.2d 193 (Miss. Ct. App. 2006) (applying Rule 803(25) in light of *Crawford* and finding video of child's statements produced at the direction of the district attorney testimonial but no confrontation clause violation because child testified and was subject to cross-examination); *Bell v. State* 928 So.2d 951 (Miss. 2006) (child's statements to police testimonial and therefore improperly admitted under 803(2)); *Hobgood v. State,* 926 So.2d 847 (Miss. 2006) (applying Rule 803(25) in light of *Crawford* and finding statements by children to family members and health care providers not testimonial but similar statements to police testimonial); *Foley v. State,* 914 So.2d 677 (Miss. 2005) (statements made as part of "neutral medical evaluations" not testimonial and properly admitted under 803(4) and 803(25)).

[Comment amended effective March 1, 1989; March 27, 1991; March 20, 1995; July 1, 1997; July 1, 2009.]

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of his statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means; or

(6) In the case of a child, because of the substantial likelihood that the emotional or psychological health of the witness would be substantially impaired if the

child had to testify in the physical presence of the accused.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement Under Belief of Impending Death*. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) *Statement Against Interest*. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of Personal or Family History*. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *Other Exceptions*. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

(6) *Forfeiture by Wrongdoing*. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

[Amended effective March 27, 1991; amended effective July 1, 2009.]

Advisory Committee Historical Note.

Effective March 20, 1995, the Comment to Rules 804(a) and (b)(1) were amended to note the repeal of a statute. 648-651 So.2d 651 So.2d XXVI (West Miss.Cas.1995).

Effective March 27, 1991, Rule 804(a) and its Comment were amended to add a sixth definition of unavailability applicable only to child declarants, Rule 804(a)(6). 574-576 So.2d XXVIII (West Miss.Cas.1991).

Effective March 1, 1989, the Comment regarding Rule 804(a)(5) was amended to include a statement that this rule does not affect the admissibility of depositions under a civil rule. 536-538 So.2d XXXII (West Miss.Cas.1989).

Comment

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

(1) When the witness exercises a privilege, the witness is deemed to be unavailable as to the portion of the witness's testimony which is covered by the claimed privilege. The trial court, however, may first make a preliminary determination that the witness has the right to claim the privilege asserted.

(2) When a witness refuses to testify, despite being ordered to do so by the court, the witness is deemed unavailable.

(3) If the witness testifies that the witness has a lack of memory as to the subject matter under inquiry, the witness is deemed to be unavailable.

(4) Death and sickness render a witness unavailable. *See Paulk v. Housing Authority of Tupelo*, 228 So. 2d 871 (Miss. 1969), and *Home Ins. Co. v. Gerlach*, 220 Miss. 732, 71 So.2d 787 (1954).

(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.

(6) The rationale for this definition of unavailability is based on the recognition of child trauma.

A finding of unavailability and *indicia* of reliability should be made on the record.

If, however, the proponent of the evidence is responsible for the existence of any of the aforementioned conditions, the condition of unavailability for the purposes of Rule 804 is not satisfied.

(b)(1) *Former Testimony***.** An essential ingredient of the former testimony exception has always been the unavailability of the declarant.

Rule 804(b)(1) permits the prior testimony to be offered (1) against the party *against* whom it was previously offered or (2) against the party who offered it previously. Thus, the rule equates the direct and redirect examination of one's own witness with the cross-examination of an adversarial witness.

It is not required that the former testimony be in an earlier proceeding of the same case. It is only essential that the party against whom it is directed had a similar motive and an opportunity to develop the testimony on the previous occasion. The rule does not speak in terms of identity of issues. Identity of issues is only important because it bears on motive. Thus, the rule deletes the law common phrase "identity of issues" and substitutes "motive" and "opportunity."

(b)(2) *Statement Under Belief of Impending Death***.** The rule allows for the dying declaration to be used in homicide cases and in civil actions, but it is not available in non-homicide criminal actions.

(b)(3) *Statement Against Interest***.** Rule 804(b)(3) expands the common law exception of declaration against interest. Traditionally, courts have recognized two declarations against interest, pecuniary and proprietary. The rule extends the exception to declarations against penal interest on the theory that such declarations are reliable. No reasonable person would make such a statement and invite possible criminal prosecution if the statement were not true.

The second sentence of the rule is concerned with hearsay which inculpates the declarant but exculpates the criminal defendant. Unless such a statement can be corroborated as reliable, it will be excluded.

(b)(4) *Statement of Personal or Family History***.** This rule is similar to Rule 803(19). The distinguishing feature is that the statements under Rule 804(b)(4) are statements made by unavailable declarants concerning their own personal and family history or that of a family member or intimate associate. Rule 803(19) focuses more on reputation.

(b) (5) This rule is identical to Rule 803(24) in both language and intent.

(b)(6) *Forfeiture by Wrongdoing.* Rule 804(b)(6) provides that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." *United State v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), *cert. denied*, 104 S.Ct. 2385(1984). *Davis v. Washington,* 126 S. Ct. 2266, 2280 (2006) ("While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system."). Likewise, a party forfeits rights under the Confrontation Clause when misconduct attributable to a party causes a witness's absence. *U.S. v. Carson,* 455 F.3d 336 (C.A.D.C. 2006) (wrongdoing by co-conspirators). The wrongdoing need not consist of a criminal act and the rule applies to all parties, including the government.

When any of the hearsay exceptions in Rule 804 are applied in a criminal case, the rights of the defendant under the Confrontations Clauses of Federal and State Constitutions must be respected. *Crawford v. Washington* 124 S.Ct. 1354 (2004) (The confrontation clause forbids "admission of testimonial statements of a witness who did not appear at trial unless [the witness is] unavailable to testify, and the defendant had had a prior opportunity for cross-examination."); *Davis v. Washington,* 126 S.Ct. 2266 (2006) (Among other things, prior

testimony, depositions, affidavits, and confessions are testimonial, as are other statements to police if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."). *See also Rubenstein v. State* 941 So. 2d 735 (Miss. 2006) (applying Rule 804(b)(5) in light of *Crawford* and finding statements nontestimonial); *Bell v. State,* 928 So. 2d 951 (Miss. Ct. App. 2006) (applying Rules 804(a)(6) and 803(2) in light of *Crawford* and finding statements testimonial).

[Comment amended effective March 1, 1989; March 27, 1991; amended March 20, 1995; amended effective July 1, 2009 to update citations and add subsection (b)(6); amended effective December 1, 2015 to update subsection (a)(5).]

RULE 805. HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Comment

This rule relates to multiple hearsay. Each hearsay part must qualify under an exception to be admissible.

RULE 806. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined in rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Comment

Rule 806 permits the impeachment and rehabilitation of a hearsay declarant. The use of inconsistent statements to impeach the declarant is not limited to prior inconsistent statements. Under the rule the inconsistent statements may be statements made subsequent to the out-of-court declaration at hand.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of Witness With Knowledge*. Testimony that a matter is what it is claimed to be.

(2) *Non-expert Opinion on Handwriting*. Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by Trier or Expert Witness*. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive Characteristics and the Like*. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice Identification*. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone Conversations*. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public Records or Reports*. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported

public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient Documents or Data Compilation*. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence twenty years or more at the time it is offered.

(9) *Process or System*. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Other Methods*. Any method of authentication or identification provided by the Mississippi Supreme Court or by the Constitution of Mississippi.

Advisory Committee Historical Note

Effective July 1, 1998, the Comment regarding Rule 901(b)(6) was amended to delete the reference to and holding of a case. 706-708 So.2d XLIII (West Miss.Cas.1998).

Comment

(a) The authentication and identification aspects of evidence are central to the concept of relevancy. Unless it be satisfactorily shown that an item of evidence is "genuine," the item is irrelevant and should be excluded.

(b) This subsection illustrates some of the possibilities under Rule 901. It is only illustrative; it does not serve as a limitation. Some of the illustrations are discussed below:

(2) *Nonexpert Opinion on Handwriting.* This authentication method has been traditionally allowed in the Mississippi courts. The rule does not set forth what the necessary criteria are for the nonexpert opinion. However, from common law practice it appears that the opinion may be based on several different standards including the witness's familiarity with the person's handwriting or the witness's corresponding with the person. *See Western Union Telegraph Co v. Goodman*, 166 Miss. 782, 146 So. 128 (1933); *Wiggins v. State*, 224 Miss. 414, 80 So.2d 17 (1955); *McCarty v. Love*, 145 Miss. 330, 110 So. 795 (1927).

(3) *Comparison by Trier or Expert Witness.* Under Rule 901(3) it is not necessary for the judge to rule first that the exemplars are genuine before the expert compares them. The standard for comparison is no different, therefore, from the

standard used in other situations, e.g., ballistics comparison. *See* FRE 901 Advisory Committee's Note.

(4) *Distinctive Characteristics and the Like.* The possibilities under the rule are myriad. Letters or phone conversations disclosing knowledge peculiar to an individual may qualify, as well as distinctive language patterns. *See* FRE 901 Advisory Committee's Note.

(5) *Voice Identification.* This authentication method has been utilized in Mississippi practice. Familiarity may be acquired either before or after the speaking which is the subject of the identification.

(6) *Telephone Conversations.* One may authenticate a conversation when he calls the number listed for a person or a business and the answering party either identified himself as that individual or conducted a transaction on behalf of the business called.

(7) *Public Records or Reports.* This represents the existing law in Mississippi. Rule 901(7) extends the common law principle to include electronically-stored information. Proving a record is public and that it is in the custody of a public official is sufficient.

(8) *Ancient Documents or Data Compilation.* The twenty-year rule for ancient documents under Rule 803(16) is repeated here. The illustration extends the authentication to electronically-stored information as in Rule 901(7). Except for the reduction of the years required for ancient documents, this illustration is consistent with Mississippi practice.

(9) *Process or System.* This illustration covers systems such as x-rays, some chemical tests, and computers. Example (9) does not foreclose taking judicial notice of the accuracy of a process or system.

(10) *Other Methods.* This illustration is given as notice that other methods are not superseded.

[Amended effective July 1, 1998.]

RULE 902. SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic Public Documents Under Seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or of the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic Public Documents Not Under Seal. A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official Publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and Periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade Inscriptions and the Like. Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.

(8) Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial Paper and Related Documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions Created by Law. Any signature, document, or other matter declared by any law of the United States or of Mississippi to be presumptively or *prima facie* genuine or authentic.

(11) Certified Records of Regularly Conducted Activities.

(A) The records of a regularly conducted activity, within the scope of Rule 803(6), about which a certificate of the custodian or other qualified witness shows (i) the first hand knowledge of that person about the making, maintenance and storage of the records; (ii) evidence that the records are authentic as required by Rule 901(a) and comply with Article X; and (iii) that the records were (a) made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (b) kept in the course of the regularly conducted activity; and (c) made by the regularly conducted activity as a regular practice. Such records are not self-authenticating if the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.

(B) As used in this subsection, "certificate" means, (i) with respect to a domestic record, a written declaration under oath or attestation subject to the penalty of perjury; and, (ii) with respect to records maintained or located in a foreign country, a written declaration signed in a foreign country which, if falsely made, would subject the maker to criminal penalty under the laws of that country. A certificate relating to a foreign record must be accompanied by a final certification as to the genuineness of the signature and the position in the regularly conducted activity of the executing individual as is required for certification of Foreign Public Documents by subsection (3) of this rule.

(C) (i) Records so certified will be self-authenticating only if the proponent gives notice to adverse parties of the intent to offer the records as self-authenticating under this rule and

provides a copy of the records and of the authenticating certificate. Such notice must be given sufficiently in advance of the trial or hearing at which they will be offered to provide the adverse party a fair opportunity to consider the offer and state any objections. (ii) Objections will be waived unless, within fifteen days after receiving the notice, the objector serves written specific objections or obtains agreement of the proponent or moves the court to enlarge the time. (iii) The proponent will be responsible for scheduling a hearing on any objections and the court should hear and decide such objections before the trial or hearing at which they will be offered. If the court cannot rule on the objections before the trial or hearing, the records will not be self-authenticating. (iv) If in a civil case, on motion by the proponent after the trial or hearing, the court determines that the objections raised no genuine questions and were made without arguable good cause, the expenses incurred by the proponent in presenting the evidence necessary to secure admission of the records shall be assessed against the objecting party and attorney.

[Amended January 31, 1990; July 1, 1997.]

Advisory Committee Historical Note.

Effective July 1, 1997, Rule 902 and its Comment were amended to add subsection (11) to allow predicates for records of regularly conducted activities to be proven by affidavit. 689-692 So.2d LXVIII (West Miss. Cas. 1997).

Effective March 20, 1995, the Comment to Rules 902(3), (8) and (9) were amended to note the repeal of statutes and to delete reference to a U.C.C. section. 648-651 So.2d 651 So.2d XXVI (West Miss.Cas.1995).

Effective January 31, 1990, Rule 902(3) was amended to make a technical change. 553-556 So. 2d XXVII (West Miss. Cas. 1990).

Comment

Rule 902 lists situations in which authenticity is taken as sufficiently established for purpose of admissibility without extrinsic evidence. However, the opponent of the evidence may always challenge the authenticity. In essence, the rule shifts the burden to the opponent. In 1990 a technical amendment was made. No substantive change was made or intended.

(1) Domestic Public Documents Under Seal. The underlying policy rests on the fact that forgery is easily detected, and the possibility of the documents not being genuine is, thus, remote. A wide range of Mississippi public records fall into this category, including acknowledgments and certificates authenticating copies of public records.

(2) Domestic Public Documents Not Under Seal. This provision permits the admission in evidence of documents signed by an official whose office has no seal, *provided* a second official having a seal certifies, under seal, the genuineness of the first signature.

(3) Foreign Public Documents. Rule 902(3) extends the presumption of authenticity to foreign official documents by a procedure of certificate. It is derived from M.R.C.P. 44(a)(2). M.C.A. § 13-1-101 (repealed effective July 1, 1991) formerly governed this procedure.

(4) Certified Copies of Public Records. Numerous statutes already exist in Mississippi providing for the authentication of copies of public records by certificate. The certificate itself qualifies as a public document, receivable as authentic when it conforms to Rule 902(1), (2), or (3). *See* M.R.C.P. 44(a). The certification under Rule 902(4) pertains to public records and not to public documents in general.

(5) Official Publications. M.R.C.P. 44(a)(1) has the same effect.

(6) Newspapers and Periodicals. This is new practice in Mississippi. The rule is based on the premise that the possibility of forgery in this area is negligible.

(7) Trade Inscription and the Like. *Curtiss Candy Co. v. Johnson*, 163 Miss. 426, 141 So. 762 (1932) early established this rule in Mississippi. The possibility of forgery is too slim for the court to require a more detailed method of authentication.

(8) Acknowledged Documents. This extends existing Mississippi law. In Mississippi the self-authentication of acknowledged documents was formerly available through a limited number of statutes, e.g., M.C.A. § 13-1-97, § 13-1-143 (both repealed effective July 1, 1991).

(9) Commercial Paper and Related Documents. Mississippi practice already allows for authentication of commercial paper pursuant to U.C.C. § 1-202, § 3-307, and § 8-105.

(11) Certified Records of Regularly Conducted Activities.

This method of self-authenticating the records of regularly conducted activities is suggested by Rule 902(11) of the Uniform Rules of Evidence. It is intended to allow, in proper cases, the introduction of these records without the expense, trial time consumption and inconvenience to witnesses who are called to provide what is often purely formalistic and undisputed predicate evidence. Part (A) permits proof by affidavit of the qualifications of the witness and the usual predicates of authenticity, the Best Evidence Rule and the Rule 803(6)

hearsay exception. Part (B) explains the required certification. Part (C) requires that the proponent have early anticipation of the use of this method so there is time before trial for notice, objections and a hearing. If objections are not decided before the trial, the proponent must plan to call the witness. The sanction for frivolous objections in civil cases is based on the M.R.C.P. 37(c) sanction for failure to admit.

When self-authenticating records are offered against the defendant in criminal cases, the rights of the defendant under the confrontation clauses of Federal and State Constitutions must be considered.

[Comment amended January 31, 1990; March 20, 1995; July 1, 1997.]

RULE 903. SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

Comment

Under this rule testimony of subscribing witnesses to a will may nonetheless be necessary to authenticate the will. *See* M.C.A. § 91-7-7 and § 91-7-9.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

RULE 1001. DEFINITIONS

For purposes of this article the following definitions are applicable:

(1) Writings and Recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. "Photographs" include still photographs, x-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it.

An "original" of a photo graph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction or by other equivalent techniques which accurately reproduce the original.

[Amended July 1, 1997.]

Advisory Committee Historical Note

Effective July 1, 1997, Rule 1001(3) and its Comment were amended to correct an apparent printing or typographical error by replacing the word "sign" with the correct word, "sight". 689-692 So.2d LXVIII (West Miss. Cases 1997).

Comment

(1) Writings and Recordings. This provision recognizes that current techniques of recordation are more complex than what we have traditionally defined as "written" or "recorded." To the extent that the best evidence rule is concerned, the rule is expanded to include modern technological methods of recording.

(2) Photographs. Photographs are defined to include an assortment of pictures.

(3) Original. This rule covers multiple originals, copies which are executed in multiple numbers. A computer printout under the rule is deemed to be an original.

(4) Duplicate. Copies which are produced by such highly accurate methods that the possibility of error is improbable are treated as originals pursuant to Rule 1003. Other copies which are subsequently produced manually are outside the definition. *See* FRE 1001, Advisory Committee's Note.

RULE 1002. REQUIREMENT OF ORIGINAL

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as other wise provided by law.

Comment

This rule is a statement of the so-called best evidence rule. The best evidence rule only applies to writings, recordings, or photographs, as defined in Rule 1001, when a party seeks to prove their contents.

RULE 1003. ADMISSIBILITY OF DUPLICATES

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Comment

This rule is a change from existing Mississippi law. The Mississippi practice has been to exclude duplicates except in cases where the original was unavailable and there was a legitimate basis for the unavailability. *See Turner v. Thomas*, 77 Miss 864, 28 So. 803 (1900). A body of case law has developed to define "unavailability" and legitimate reasons for it. *See* Ellis and Williams, Mississippi Evidence, § 11-3.

RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue.

Comment

Secondary evidence is admissible in lieu of the original in certain instances. Subsections 1, 2, and 3 conform to existing Mississippi case law. Subsection 4 dispenses with the best evidence rule in collateral matters. The rule follows the "English Rule" which holds that there are no degrees of secondary evidence. Secondary evidence is not ranked, and, thus, no principle of preference is established.

RULE 1005. PUBLIC RECORDS

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Comment

This rule is similar to Mississippi practice. It recognizes that it is improbable that one could utilize an original public record in court. Therefore, certified copies are admissible, as well as oral testimony of a witness who has compared the original with the copy. Rule 1005 differs from 1004 by recognizing "degrees" of secondary evidence in regard to the admission of public records.

RULE 1006. SUMMARIES

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Comment

This rule represents a change in Mississippi practice. Rule 1006 refers to voluminous writings, as well as recordings and photographs. Under the rule, a summary of the voluminous material is sufficient as admissible evidence. The underlying material need not be introduced simultaneously into evidence as had been the practice in Mississippi. *See Crawford v. State*, 162 Miss. .158, 138 So. 589 (1932). This Mississippi court has treated the summaries as demonstrative tools rather than as evidence. Rule 1006 provides that the summaries are clearly

admissible as evidence, but requires that the underlying material be made available to the other parties for their examination.

RULE 1007. TESTIMONY OR WRITTEN ADMISSION OF PARTY

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

Comment

The original of a writing, recording, or photograph is not required to be produced if the party against whom it is offered testifies about, or admits in writing, the contents of such original.

RULE 1008. FUNCTIONS OF COURT AND JURY

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Comment

Most preliminary questions of fact regarding the best evidence rule will be decided by the judge pursuant to Rule 104. For example, the judge must decide whether the loss of the original has been established. On the other hand, questions which go to the merits of the case are properly jury questions, subject, however, to the control vested in the trial judge by Rule 104(b), supra.

ARTICLE XI. MISCELLANEOUS RULES

RULE 1101. APPLICABILITY OF RULES

(a) Courts and Proceedings. Except as otherwise provided by subdivision (b), these rules apply to all actions and proceedings in the courts of the State of Mississippi.

(b) Rules Inapplicable. Except for the rules pertaining to privileges, these rules do not apply in the following situations:

(1) *Preliminary Questions of Fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104(a).

(2) *Grand Jury.* Proceedings before grand juries.

(3) *Miscellaneous Proceedings.* Proceedings for extradition or rendition; probable cause hearings in criminal cases and youth court cases; sentencing; disposition hearings; granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(4) *Contempt Proceedings.* Contempt proceedings in which the court may act summarily.

Comment

Subsection (a) provides for the applicability of the rules in all actions in courts in the state with enumerated exceptions which are set forth in Subsection (b).

RULE 1102. TITLE

These rules shall be known as the Mississippi Rules of Evidence and may be cited as M.R.E., *e.g.*, M.R.E. 501.

RULE 1103.

All evidentiary rules, whether provided by statute, court decision or court rule, which are inconsistent with the Mississippi Rules of Evidence are hereby repealed.